

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6837

FLOYD EDWARDS, Petitioner

-vs-

STATE OF OHIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE OHIO SUPREME COURT

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PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

Floyd Edwards, the petitioner herein, prays that a writ of Certiorari Ohio Supreme Court entered in the above-captioned case on December 29, 1976.

OPINIONS BELOW

The decision of the Ohio Supreme Court is reported in State v. Edwards, 24 Ohio St. 2d 31, and is reproduced in the Appendix hereto, infra, pages 1-9.

The Decision and Journal Entry of the Ohio Court of Appeals, Ninth Judicial District, is unreported and is reproduced in the Appendix, hereto, infra, pages 10 thru 30. The Journal Entries of the Ohio Court of Common Pleas are unreported and are reproduced in the Appendix, hereto, infra, pages 31-38.

JURISDICTION

The decision of the Ohio Supreme Court (Appendix, infra, pages 1-9) was entered on December 29, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the Imposition and Carrying Out of Petitioner's Death Sentence Violate the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?
2. Does the Submitting of the Petitioner to a Pre-Trial Psychiatric Evaluation to Determine the Existence of a Mitigating Factor Which Could Preclude the Imposition of the Death Penalty and Then Making that Report Available to Both the Judge and Prosecutor Violate Petitioner's Rights Under the First, Fourth, Sixth, Ninth and Fourteenth Amendments?
3. Does the Mere Recitation of Miranda Warnings to Petitioner who Has Admittedly Limited Mental Ability, Violate his Rights Under the Fifth and Sixth Amendments?
4. Did the Trial Court Deny Petitioner his Right to a Fair Trial Under the Fourteenth Amendment by Limiting the Scope of his Counsel's Summation to the Jury?
5. Did the Jury Instructions in Petitioner's Case Violate his Rights under the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED.

1. This case involves the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

1. This case also involves the following Provisions of Ohio Law Pertaining to Capital Punishment:

Ohio Rev. Code Ann. Section 2903.01 (1974). Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. Section 2929.02 (1974). Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

Ohio Rev. Code Ann. Section 2929.03 (1974). Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravating murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge, whether the offender is guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined.

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by a jury.

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. Section 2929.04 (1974). Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist

was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of the course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance (preponderance) of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed but for the fact that the offender was under stress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT OF THE CASE

Floyd Edwards, the Petitioner, was indicted by the Summit County Grand Jury for the aggravated murder, with two specifications, in violation of Ohio Revised Code Section 2929.04(A)(3) and Ohio Revised Code Section 2929.04(A)(7) and for aggravated robbery in violation of Ohio Revised Code Section 2911.01(A)(1). He was arraigned on January 17, 1975, at which time he entered a plea of not guilty to both counts.

On January 27, 1975, the trial court issued an order appointing Dr. Elliot Migdal, a psychiatrist, to conduct a psychological examination of Petitioner (Appendix [hereinafter App.] 141). Dr. Migdal met with the defendant for approximately one hour and a half on February 5, 1975. His main interest was to secure from Petitioner detailed information about Petitioner's involvement in the crimes for which he had been indicted but not yet tried. (See generally, February 25, 1975, letter of Dr. Migdal to the Court, App. at 143-145).

Subsequently, on February 12, 1977, Petitioner filed a "Motion to Restrict Use of Psychiatric Report" by which he sought to prevent the report of Dr. Migdal from being given to the prosecutor or the trial judge "unless and until" Petitioner was convicted at trial. (App. at 142). This motion was based upon Petitioner's claim that the trial court was without authority to order such an evaluation prior to trial and that the disclosure of the report to the judge and the prosecutor would be prejudicial to Petitioner.

Dr. Migdal's evaluation was contained in a letter dated February 25, 1975, and filed with the Court on February 27, 1975. (App. at 143-145). It consisted primarily of facts and analysis with respect to Petitioner's purported involvement in the robbery and death of Joseph Eschak, Jr. Dr. Migdal's ultimate conclusion was that Petitioner was not suffering from any mental deficiency.

Immediately prior to Petitioner's trial on March 5, 1975, the trial court conducted a hearing upon all outstanding motions. The first matter to be given consideration was Petitioner's February 12th Motion to Restrict access to Dr. Migdal's report. Though the transcript may be fairly read to indicate that both the trial judge and the prosecutor had, by that time, read Dr. Migdal's report (T. generally at pp. 185-187; App. at 40-42), Petitioner's motion, and the issue of prejudice to Petitioner was argued to the court. The motion was denied (T. p. 187; App. at 42.)

Subsequently, the trial court conducted a suppression hearing upon Petitioner's "Motion to Suppress Statement Made by the Defendant" (T. pp. 189-281.) Akron Police Officers Russel Cross and Harold Graig, and Petitioner, all testified with respect to the statements which the state claimed Petitioner had made to the police and the facts and circumstances out of which the statements allegedly arose. The legal issues presented to the trial court by this hearing included: whether the police officers had properly informed Petitioner of his constitutional rights as required under Miranda v. Arizona, 384 U.S. 436 (1964); whether the statements were a product of a false promise of leniency or of duress or of coercion; and the effect, if any of the fact that the state had failed to properly record one of Petitioner's statements so as to leave a gap in one of the tapes the state intended to introduce into evidence at the trial. The trial court overruled Petitioner's Motion to Suppress, stating, in part:

"I am finding: 1. The Miranda Warnings were given to him, he understood them. He complied with them.
2. I find no duress at all.

As far as the missing link between the tape, its been explained to the Court's satisfaction . . ." (T. p. 280; App. at 50.)

Following the disposition of these motions the trial commenced. The Petitioner objected to the testimony of the state's first witness, Akron Police Officer Ronald Davis upon the grounds that his name had not been one of those given to defendant as a state witness when discovery was had pursuant to Rule 16 of the Ohio Rules of Criminal Procedure. (T. pp. 293-294; App. at 53-54.) This objection was overruled. (T. p. 294; App. at 54.)

In its case in chief the state was either unable or unwilling to call to the stand anyone who had actually witnessed the death of the deceased, Mr. Eschak. If the defendant's motion to suppress the evidence that resulted from his nine and one-half hour interrogation had been granted, it seems clear that the state would have had insufficient evidence to present its case to the jury.
¹

The statements made to the police, were therefore, crucial to the state's case. Those statements were obtained in this manner. In response to the information the police department received Petitioner and one Haywood Manning were picked up at 5:30 p.m. and taken to the police station in downtown Akron. (T. pp. 342-343; App. at pp. 63-64). Petitioner was held in an interrogation room from the time he was brought to the police station until approximately 3:00 a.m. the next morning. (T. p. 399; App. at p. 65). He was interviewed by police Sergeant Russell Cross at approximately 6:30 p.m. (T. p. 347; App. at p. 68.) He had a tape recorded interview with Sergeant Cross and Assistant Summit County Prosecutor Shoemaker Commencing at 8:20 p.m. (T. pp. 347, 355; App. at pp. 68, 69.) He gave a tape recorded interview from 10:00-10:15 p.m. to Detective Harold J. Craig in the presence of Haywood Manning. (T. pp. 443, 453; App. at pp. 70, 71.) At approximately

¹ The state's independent evidence established that at 6:19 on December 28, 1974, two officers of the Akron Police Department to dispatched to investigate a possible crime at 223 Wooster Avenue, Akron, Ohio (T. p. 294; App. at p. 54), that when they arrived on the scene they discovered Mr. Eshack lying face down in the center of the store, dead (T. pp. 295-296; App. at pp. 55-56); that there was a shell casing on the floor approximately 18 to 30 inches from the body (T. p. 296; App. at p. 56); that Mr. Eshack had an entrance wound from a bullet two inches from the hairline in the middle of the back of his head, (T. p. 306; App. at p. 57); that this wound was the cause of death (T. p. 411; App. at p. 58); that he was found laying on top of his glasses and hat (T. p. 307); that he had not wallet on his person, but he did have five dollars and some change in his pocket (T. p. 309; App. at p. 59); that a wallet containing some papers, bearing the decedants name was found two days later at the Akron Metropolitan Housing Authority near where petitioner stayed (T. pp. 20, 341-342; App. at pp. 61, 62-63); and that on January 9, 1975, the police department had "received word that Floyd Edwards may possibly be involved in the homicide." (T. p. 342; App. at p. 63).

It should also be noted that over the objections of the defendant the state was also allowed to elicit hearsay testimony from Officer Cross concerning the out of court statements of two individuals who did not testify at trial, Haywood Manning and Butch Dubuice. (T. pp. 428-432; App. at pp. 66-68).

2:30 a.m. on the morning of January 10, 1977, Petitioner was asked to identify a gun which was discovered as a result of this questioning and which later was established to have been the murder weapon (T. p. 425.) At 2:45 a.m. on January 10, 1975, the last tape recorded statement was made (T. p. 399; App at p. 65.) Petitioner was finally booked at 5:00 a.m.

At trial the state introduced testimony and tape recordings in regard to these various statements. In sum, the state indicated that under questioning by police Petitioner stated that he and one Stanford Harris had gone to Mr. Eschak's store in order to rob him; that he, the Petitioner, had pulled a gun on the decedent; that he and the decedent had struggled over the gun and fell to the floor; that while they were struggling on the floor, Stanford Harris had come to his aid; and that since Petitioner's finger was not on the trigger when the gun went off, it must have been Stanford Harris who shot the decedent.

Under cross-examination that Detective Craig admitted that the tapes did not contain the full text of police conversations (T. p. 456) and that there were "a lot of things" that Petitioner told police which was not recorded on the tapes. (T. p. 458) Further, Sergeant Cross indicated that while the police department believed certain portions of these statements, i.e. those incriminating Petitioner, they did not believe other portions of the statements, i.e. those incriminating Stanford Harris, and consequently, though Harris was initially arrested upon this offense by the time of Petitioner's trial all charges against him had been dropped (T. pp. 418-419.)

At the conclusion of the State's case, Petitioner moved for directed verdict on the robbery charge and both specifications to the murder charge. This motion was overruled by the Court. (T. p. 488; App. at p. 78.) Thereafter, the Petitioner rested without calling any witnesses or offering any evidence. At the conclusion of Petitioner's case, Respondent made a motion pursuant to Ohio Criminal Rule 16(B) to preclude Petitioner from commenting to the jury on the Respondent's failure to call any witness whose names appeared on the witness list the state had given to Petitioner's counsel.

This motion was granted whereby precluding Petitioner from commenting upon the fact that the state had failed to present the testimony of three people whose knowledge of allegedly relevant information concerning Petitioner's guilt or innocence was brought to the jury's attention by the state. (T. p. 497; App. at p. 70.) The Court then charged the jury, inter alia, that if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill must be inferred from the use of said weapon (T. p. 554; App. at p. 80.) The Court also instructed the jury as a matter of law that before the jury could find the Defendant guilty of aggravated robbery, the State must prove beyond a reasonable doubt that on the 28th day of December, 1974, in Summit County, Ohio, the Defendant obtained or attempted to obtain or fled after obtaining property of some value, however small, for the purpose of depriving Joseph Eshack, Jr., of such property; and that the Defendant had a deadly weapon on or about his person; or that the Defendant inflicted serious physical harm on the person of Joseph Eshack, Jr.

During the jury deliberations, the jury requested that the Court explain the relationship between aggravated murder and the specifications. (T. p. 570; App. at p. 81.) Counsel for Petitioner objected (T. p. 578; App. at p. 82) but over this objection the Court read specification 1 and 2 to the jury. (T. p. 581; App. at p. 84.)

The jury returned a verdict finding Petitioner guilty of aggravated murder; not guilty of specification 1; guilty of specification 2; and guilty of aggravated robbery.

After the verdict of guilty, the jury was excused, counsel for the Defendant objected to the Court permitting several jurors to take written notes during the time the Court re-read the specifications over the Defendant's objections. (T. pp. 581-582; App. at pp. 84-85.)

On March 21st, 1975, Defendant filed a motion for a new trial based

upon eleven separate grounds. The grounds relevant to this Petitioner include the following:

1. That the Court erred in allowing the State to introduce into evidence the tape recordings of statements Petitioner made to the police.
2. The Court refused to allow defense counsel to comment on final argument upon the State's failure to call certain witnesses.
3. The Court gave to the prosecutor a copy of Dr. Migdal's psychiatric examination of Petitioner which related information about the crimes with which the Petitioner was charged. This was asserted to be a violation of the Fifth Amendment.

After the finding of guilty the Court ordered the Defendant examined by Dr. Abdon Villalba, a psychiatrist, and by the Summit County Diagnostic Center. On April 29, 1975, a mitigation hearing was had for the purpose of determining whether or not one of the three mitigating circumstances existed to spare the Defendant from the electric chair.

The Defendant called the Summit County Diagnostic Center psychologist Daniel Rienhold and Dr. Abdon Villalba, a psychiatrist, both selected by the Court and considered the Court's witnesses. Rienhold testified that he examined Edwards on two occasions--one being last month (March); the other was done in January (T. p. 579; App. at p. 579.) His inter-office memo which was part of his report to the Court was dated five days after the Defendant's arraignment. His report to the Court is dated March 12, 1975, five days after the jury verdict. Mr. Rienhold testified that the Defendant's full scale I.Q. was 76 (T. p. 601; App. at p. 89) and a performance I.Q. of 72. He further testified that a person with an I.Q. of 79 or less is borderline mental deficiency (T. p. 600; App. at p. 88.) Rienhold further testified that Edwards is lacking in mental capacity (T. p. 603-604; App. at pp. 90-91.) and that the I.Q. score of Edwards can fluctuate downward to as low as 70, (T. p. 606; App. at p. 92.) In response cross-examination by the State, (T. p. 608; App. at p. 93), Mr. Rienhold testified that to determine mental deficiency he has "to go by the I.Q. legally," and that an I.Q. score does "not necessarily" indicate a person is mentally deficient

(T. p. 611; App. at p. 94), and that Edwards is a borderline case of being mentally deficient (T. p. 612; App. at p. 95.) He further stated that Mr. Edwards is not of average intelligence (T. p. 614.) In response to a question by the Court, Rienhold said there is no straight-forward definition of mental deficiency (T. p. 615.) He stated that he goes along with Apple Creek State Hospital's definition that if a person has an I.Q. of 68 or below, he is mentally deficient.

Dr. Villalba testified he examined Edwards two times for a total of one and one half hours (T. p. 634; App. at p. 105.) He further testified that Edwards' full scale I.Q. of 76 borderlined on mental deficiency (T. 635; App. at p. 106.) Dr. Villalba further testified that, because of his mental capacity, Edwards would be less able to form the same good judgment that a person of average I.Q. could under stress (T. pp. 637, 643; App. at pp. 107, 108), and that in his opinion Edwards is on the borderline of being mentally deficient (T. p. 644; App. at p. 109.) In response to a question by the State, Dr. Villalba referred to a diagnostic manual of mental disorders and defined mental deficiency as referring to "subnormal general intellectual functioning which originates during the developmental period and is associated with impairment of either learning and social adjustment or maturation, or both" (T. p. 644; App. at p. 109.) Dr. Villalba also testified (T. pp. 648-649; App. at pp. 110-111) that Edwards in fact is mentally deficient and that Edwards' background and I.Q. would affect his ability to function in our society (T. p. 653; App. at p. 112.)

In addition to Mr. Rienhold and Dr. Villalba, the Defendant called a Phyllis Berthelot, who brought Petitioner's induction file and testified that Edwards failed his mental examination for entrance into the Army (T. p. 621; App. at p. 97.) She further testified that Petitioner was classified by the military as "mentally disqualified; not qualified for induction" (T. p. 620; App. at p. 96.)

Jasper Liggens testified that as Supportive Counselor to Petitioner

during part of the time Petitioner spent in the Juvenile Center, he tutored Petitioner for approximately seven weeks to try to help him pass the military exam (T. p. 699; App. at p. 131.)

Shirley Verde testified that she was a school teacher who had taught Petitioner for about two months in 1971 (T. p. 623; App. at p. 98); that she gave him tests and that in 1971 while a junior at South High School, he was reading at a second grade level (T. p. 625; App. at p. 99); and that Petitioner tried to hide the fact that he was of not normal intelligence (T. p. 626; App. at p. 100.) She further testified Edwards had difficulty understanding the English language (T. pp. 626, 627; App. at pp. 100, 101); that he was a below normal student (T. p. 629; App. at p. 102), and that she would consider him a slow learner (T. p. 626; App. at p. 102.) She also testified that she tested him for math and spelling (T. p. 630; App. at p. 103) and that he was doing second grade spelling and fourth grade math (T. p. 631; App. at p. 104.)

Susan Becker, a counselor at South High School, knew Edwards, brought Edwards' school record and testified that he graduated 187th out of 188 in his class (T. p. 656; App. at p. 114); that his I.Q. test previously given were 74 and 70 (T. p. 655; App. at p. 113) that he was classified as a slow learner (T. p. 657; App. at p. 115); and that he was placed in Educable Mentally Retarded classes (T. p. 658; App. at p. 116.)

Mr. William Nurches testified that for 25 years his specialty was slow learners, or educable mentally retarded students. He testified that Edwards tried to hide the fact that he was a slow learner and that he couldn't read (T. pp. 687, 688; App. at pp. 128, 129.) He stated that it was obvious that Edwards lacked the capacity to learn (T. p. 692; App. at p. 130.)

Edward Kirt, Chief Psychologist for the Akron Board of Education testified that the Akron Board of Education keeps file cards on students who are mentally defective (T. p. 706; App. at p. 132) and that such a card was kept on Floyd Edwards (T. p. 707; App. at p. 133.) He further testified that a person with a low I.Q. has less than average mentality (T. p. 710;

App. at p. 134); that Petitioner's ability to learn is diminished (T. p. 710; App. at p. 134); and that Petitioner has limited mentality (T. p. 710; App. at p. 134.) He further could not testify as to the definition of mentally deficient because "it is not well defined" (T. p. 711; App. at p. 135.)

The State's witness Elliot Migdal, a psychiatrist, examined Edwards during the time Edwards was awaiting trial and while he had entered a plea of not guilty. His testimony at the mitigation hearing paralleled the letter sent to Judge Barbuto dated February 25, 1975. As in the letter, Migdal was of the opinion that Petitioner was not mentally deficient because he had tried to "manipulate" him, (T. p. 668; App. at p. 121), and was refusing to discuss "his present offense by going off on tangents regarding his past history" (App. at p. 143.) Dr. Migdal defined mental deficiency as the ability to learn with support and also to be able to obey simple commands and to be able to make somewhat adequate adjustment to society. (T. p. 664.) Dr. Migdal also testified that there was a direct correlation between I.Q. and mental deficiency (T. p. 666; App. at p. 120), and that during his examination and report he did not know Edwards I.Q. score (T. p. 669; App. at p. 122.) As a result of Migdal's pre-trial examination he was of the opinion that Petitioner was of average intelligence (T. pp. 665, 671; App. at pp. 119, 122), but he realized that he had overestimated the intelligence when he saw Dr. Rienhold's report. (T. p. 673; App. at p. 124.) Dr. Migdal also testified in his opinion a person with an I.Q. of 68 to 85 is borderline on mental retardation (T. p. 674; App. at p. 125) and that Edwards is below the average mentality (T. pp. 675, 676; App. at pp. 126, 127.)

At the conclusion of the Mitigation Hearing, the Court said the Defendant failed to prove by the preponderance of the evidence that there were mitigating circumstances to spare him from the electric chair and therefore, sentenced him to death.

A timely appeal was filed in the Ninth District Court of Appeal where twelve errors were assigned including the following which have relevance

to the within action:

"The Court erred in allowing the Prosecutor to receive a copy of Dr. Elliot Migdal's psychiatric examination prior to the trial and conviction of the Defendant."

"The Court erred in not suppressing statements made by the Defendant to the Akron Police."

"The Court erred in permitting into evidence the tape recording of the Defendant's confession with reference to the killing of the decedent."

"The Court erred in not allowing Defendant's counsel in final argument to the jury to comment that the State failed to call call two witnesses, Haywood Manning and Anita Watson, whose names frequently were mentioned in the trial by the State."

"The Court erred in its charge to the jury when it instructed the jury that the purpose to kill must (Emphasis added) be inferred from the use of said weapon."

"The Ohio Statutes with reference to aggravated murder, a capital offense, and the related sections dealing with death in the electric chair are unconstitutional for the reason that the mitigating circumstance of mental deficiency has no definition in law, is vague, ambiguous and impossible to ascertain with any degree of uniformity."

"The Ohio Statute with reference to aggravated murder and related sections dealing with death in the electric chair are unconstitutional for the reason that it does not assure the equal protection of the laws."

"The Court erred in its letter to Abdon Villaba and Elliot Migdal, psychiatrists, with reference to the Court's definition of mental deficiency."

"The Court's finding that the Defendant failed to prove that the offense of aggravated murder was not the product of mental deficiency is manifestly against the weight of the evidence."

The Court of Appeals overruled each of these assignments of error and affirmed the judgment of the trial court by its Decision and Journal Entry of November 26, 1975. (App. 10-30).

Pursuant to Article IV, Section 2 of the Ohio Constitution a timely appeal as of right was taken to the Ohio Supreme Court. By that appeal petitioner advanced essentially the same twelve assignments of error, though the wording was somewhat different. The Ohio Supreme Court found none of these propositions of law to be meritorious and on December 29, 1976 affirmed the decision of the courts below. *State v. Edwards*, 49 Ohio St. 2d 31 (1976) (App. 1-9).

On January 19, 1977 Petitioner obtained a stay of execution from the Ohio Supreme Court until such time as this Court should make a final determination in his case. Upon motion of the Petitioner, the time for the filing of the Petition for Writ of Certiorari was extended until May 28, 1977. (App. 138). Petitioner is now before this Honorable Court upon a Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

Summary of the Ohio Capital Punishment Statutes

The crime of aggravated murder, Ohio Revised Code, Section 2903.01 is a Capital offense in Ohio, for which the penalty may be life or death. The accused becomes a candidate for the ultimate penalty by being indicted by the Grand Jury for aggravated murder and one of the seven aggravating specifications provided in Ohio Revised Code 2929.04(A). Aggravated murder itself falls into two categories, either the purposeful killing of another with "prior calculation and design" or the purposeful killing of another in the course of committing any one of seven other felonies. Thus, the first category is essentially the common law offense of premeditated murder while the latter is essentially felony-murder with the additional requirement that the death be purposefully caused.

After indictment for aggravated murder with specifications, the accused is given the choice of whether first phase or guilt phase of his case shall be heard by the judge or a jury. If the defendant waives his right to a jury trial then his case is heard by a three (3) judge panel. At the conclusion of the trial, if it is a jury trial, the jury is instructed on both aggravated murder and the aggravating specifications. No mention is to be made to the jury of the penalty which may be the consequences of a guilty or not guilty verdict on any charge or specification. (Ohio Revised Code 2929.03 (B)).

The accused remains a candidate for the ultimate penalty if and only if the jury or the three judge panel unanimously returns a verdict of guilty, beyond a reasonable doubt on both aggravated murder and on aggravating specification. If a verdict of guilty on just the charge of

aggravated murder is returned, life imprisonment is imposed.

If a verdict of guilty is returned on both the charge and specification, the jury is discharged and the trial begins the second or mitigation phase of the trial.

Prior to the mitigation hearing, the Court is required to have a pre-sentence investigation and a psychiatric examination of the defendant conducted. Copies of the reports are furnished to the counsel for both the state and defense. (Ohio Revised Code 2929.03 (D)).

The purpose of the mitigation hearing is to determine the presence or absence of mitigating factors listed in Ohio Revised Code 2929.04 (B). Unless the defendant can establish by a preponderance of evidence one of the three mitigating circumstances, the death penalty is mandatory.

The mitigation hearing is tried before the trial judge or if a jury has been waived for the guilt phase of trial, the same three judge panel. At the hearing, the accused can present relevant evidence as to the mitigating factors. The accused can make a statement either under oath or not but if he makes a statement under oath he is subject to cross examination. At the conclusion of the hearing if the trial judge determines that the defendant has not met his burden in establishing one of the three mitigating circumstances, the death penalty is mandatory. In the case of three judge panel, the judges must unanimously agree that the accused has not met his burden of proof to impose the Death Penalty. No findings of fact or conclusion of law are required of the court other than a general finding of no mitigating circumstances.

The Ohio statutes violate Petitioner's Fourteenth Amendment rights by placing the burden of proof upon him with respect to the issue of degree of culpability and resulting punishment.

Ohio Revised Code Section 2929.03 provides that in the event an individual is indicted and convicted for aggravated murder in violation of R.C. 2903.01 and is also indicted and found guilty of one or more of the specifications set forth in Ohio Revised Code 2929.04 (A), the court shall conduct a mitigation hearing to determine whether there exist any of the three mitigating factors set forth in R.C. 2929.04(B). If the court finds that none of the mitigating factors are ". . . established by a preponderance of the evidence, it shall impose sentences of death on the offender. Otherwise it shall impose sentence of life imprisonment on the offender." R.C. 2929.03 (E).

The words of the statute plainly require a defendant to bear the burden of proving by a preponderance of evidence that he is entitled to continue to live by virtue of the existence of one or more of the mitigating factors. See State v. Woods, 48 Ohio St. 2d 127, 135 (1976); Committee Comment to R.C. 2929.03 reprinted in Page's Ohio Revised Code Ann., Title 29 (1975).

Such burden was placed upon defendant in the trial court below (T. pp. 594, 728-729, App. at 87, 136-7). Petitioner respectfully submits that the lack of any mitigating factor is, in reality, an element of the crime and that the state's requirement that he prove the existence of a mitigating circumstance by a preponderance of the evidence violates Petitioner's Fourteenth Amendment due process right to require the state to prove each and every element beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970).

Though this aspect of Ohio's death penalty has been raised on three separate occasions, only in State v. Hudson, No. 35562, (Cuy. Cty. C.A. March 17, 1977) was the existence of Mullaney v. Wilbur, supra, and a constitutional issue acknowledged.² The State Court of Appeals held that Mullaney was not applicable to Ohio's mitigation hearings because, ". . . the punishment aspect of a case, i.e., sentencing, is clearly distinguishable from the adjudicatory phase. . . ." State v. Hudson, supra, 8-9 (App. at 158-159).

2

In State v. S. Lockett, C.A. No. 7780 (Summit Cty. C.A., March 3, 1976), 15-16 (App. at 166-167) the pertinent portions of the Court of Appeals decision upon this issue were as follows:

"Mitigation of sentence has traditionally been a defense function, and the right of leniency has always been based upon the circumstances of the case and of the circumstances surrounding the defendant himself. . . ."

"We find no conflict with the Constitution or other laws in this statutory provision governing mitigation of sentence pursuant to a separate hearing after guilt has been established. In fact, it provides an added benefit to the convicted felon."

The response of the Ohio Supreme Court was similar:

"Appellant's argument misconstrues [sic] statutory sentencing procedures. Appellant's argument would have the state prove the proper punishment. Clearly, the introduction of mitigating circumstances has traditionally been a defense function. What appellant fails to perceive is the fact that her guilt has already been proven by the time of the mitigation stage of the proceedings. The mitigating circumstances listed in R.C. 2929.04(B) relate to the lessening of punishment and are far broader than affirmative defenses which the defense must prove in order to excuse or otherwise justify the commission of an offense."

"We find no constitutional conflict in imposing the burden of proving mitigation of punishment on a defendant already adjudged guilty of the commission of a capital offense. This proposition of law is without merit."

State v. S. Lockett, 49 Ohio St. 2d 48, 65-69 (1976).

This analysis might be correct if the facts developed at the mitigation hearing were to be used by the trial judge in exercising discretion to choose between different sentencing alternatives. But Ohio Revised Code Section 2929.03(E) clearly denies the trial judge any sentencing discretion. Rather, if one set of facts exists, then the trial court has no choice but to sentence the defendant to death, while if the other set of circumstances exists, the court must sentence the defendant to life imprisonment.

It is evident, therefore, that those people who commit an aggravated murder under the factual circumstances set forth in the "mitigation" portion of the statute should not receive the death penalty. Similarly, the legislature has decreed that those who commit an aggravated murder in any other circumstance should be executed. The absence of any of the circumstances set forth in the "mitigation" portion of the statute is a condition precedent for execution. As such, it is an element of the offense which the state must prove beyond a reasonable doubt.

Further, it should be noted that there is a virtual identity between the function of the "mitigating" circumstances under Ohio law which would reduce the penalty from death to life imprisonment and the existence of "provocation" in Mullaney which would make the difference between a life sentence, on the one hand, and a sentence ranging from a fine to twenty years imprisonment on the other hand. Indeed, in Mullaney the state--like the Ohio Court of Appeals--attempted to justify placing the burden of proof upon the defendant by arguing that the absence of heat of passion on sudden provocation was not a "fact necessary to constitute the crime" of felonious homicide. Rather, the state of Maine--like the state of Ohio in the case at bar--argued that the question of provocation was considered only on the issue of punishment after it was determined the accused was guilty of at least manslaughter. Mullaney at 697, n. 16.

In rejecting that argument, this Court's reasoning pointed out the infirmity that Petitioner believes exists in Ohio's statutes:

". . . if Winship were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect. . . . It would only be necessary to redefine the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment." (Emphasis added.)

Mullaney v. Wilbur, supra at 697.

Indeed, if the position of the State of Ohio is correct, then there is no constitutional barrier to creating a single homicide offense of murder, punishable by death, and requiring those who commit what are now defined as lesser offenses, e.g., involuntary manslaughter, vehicular homicide, to prove by a preponderance that their punishment should not be death because "mitigating" circumstances exist.

Finally, since this Court held in Mullaney that our system of justice is "concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability," Mullaney at 697, 698, Petitioner reads Mullaney to apply to the case at bar even if it were assumed, arguendo, that the proof related only to punishment and not to the essential elements of the offense. For:

"[U]nder this burden of proof, a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result. . . ." (Emphasis added.)

Mullaney at 703.

Since "death is qualitatively different from a sentence of imprisonment . . ." and "differs more from life imprisonment than a 100-year prison term differs from one of only a year . . .," Woodson v. North Carolina, 428 U.S. 40, 96 S. Ct. 2978, 2992 (1976), it is an intolerable situation when a person in the State of Ohio can be executed when the evidence indicates that it is "as likely as not" that that person deserves to live.

Thus, whether this burden of proof is viewed as being imposed upon the defendant as an "element of the offense," or as a standard for applying

the proper penalty, it is evident that it is being applied to the prejudice of Petitioner's constitutional rights. This error was especially grievous in Petitioner's case where the record clearly suggests that the result might have been otherwise had the burden been upon the state.

"Needless to say, the Court was affected by the background of this boy, or this man I should say, living under the conditions that he had to live and responding the way he responded through all the conditions and the Court was sympathetic in that regard, but the Court in fair conscience could not find that there was mitigation in this case."

"The Court appreciates the fact that a lot of his friends who worked with him throughout the years came and spoke on his behalf, but again the mitigation, the preponderance was not there. . . ."

(T. pp. 728-729.)

Because of the failure of the Ohio courts to acknowledge the existence of the constitutional issue and to follow the mandate of this Court's decision in Mullaney v. Wilbur, supra, Petitioner submits that certiorari should be granted in order to properly enforce the supremacy clause of the United States Constitution.

C.

The Ohio death penalty statutes violate Petitioner's Sixth, Eighth and Fourteenth Amendment rights to a trial by a jury of his peers.

Petitioner's Sixth Amendment claim is grounded on his right to require the state to prove each and every element of the offense to a jury of his peers. As set forth more fully above, the Ohio capital punishment system requires that an individual be indicted for and convicted of aggravated murder with specifications and that he be unable to prove that he comes within one or more of the three mitigation categories before he can be sentenced to death. Under Ohio Revised Code Section 2929.03(C) the factual determination upon the existence of mitigation is taken out of the hands of the jury and ruled upon by the trial judge or a three-judge panel.

Since the absence of mitigating circumstances is one of the essential elements of the crime of aggravated murder in which the accused is sentenced to death, he is entitled to a trial by jury upon that issue.

Further, even if it is assumed, arguendo, that the factual determination relates to only an aspect of punishment and not an element of the offense, the resolution of the factual question is of such overriding importance that Petitioner is entitled to have that determination made by a ³ jury. Indeed, this Court recognized in Mullaney v. Wilbur, supra, that the determination of facts pertaining to culpability "may be of greater importance than the difference between guilt and innocence for many lesser crimes. . . ." Obviously the resolution of facts which will determine whether the petitioner lives or dies creates such a situation. See Woodson v. North Carolina, supra at 2992. Under this circumstance the right to a jury determination of these crucial facts cannot be constitutionally denied to Petitioner. See United States v. Kramer, 289 F. 2d 909 (2d Cir. 1961).

Without respect to the resolution of his Sixth Amendment claim, Petitioner submits that he has a separate and independent right under the Eighth and Fourteenth Amendments to the Constitution to have the determination of life or death made by a jury. In support of this claim, Petitioner submits the following:

First. The evolving standards of decency that are reflected by the Eighth Amendment can only find proper expression in the context of capital punishment by the existence of jury decision-making upon the issue of life or death. As this Court recognized in Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1967):

". . . one of the most important functions any jury can perform in making such a selection [between life imprisonment and capital punishment] is to maintain a

³ Mullaney v. Wilbur, 321 U.S. 684, 697, 698 (1975): "the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."

link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." (Citation omitted.) (Emphasis added.)

This conclusion was quoted with approval in Gregg v. Georgia, 428 U.S. 153 96 S. Ct. 2909, 2929 (1976). Indeed, in Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 2986 (1976) jury decisions with respect to capital punishment were recognized as one of "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society."

Further, in Gregg v. Georgia, supra, the jury was found to be a significant and reliable objective index of contemporary values because it is so directly involved. To allow states to exclude the jury from decision making on the issue of death would be tantamount to abandoning the "evolving standards of decency" test of the Eighth Amendment. A decision that jury participation is not required by the Eighth Amendment would thereby allow the state to effectively undermine the force of that amendment by removing one of the two "crucial indicators" of "evolving standards of decency."

Second. The guarantee of a right to a trial by jury is more than an inestimable right--it also "reflects a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

Though the authors of the Constitution sought to create a democratic government, they nevertheless adopted the Sixth Amendment with the clear intent of protecting "the accused from government oppression." Singer v. United States, 380 U.S. 24, 31 (1965). It was fully contemplated that such oppression might come from the judicial branch as well as from other branches of the government.

As this Court so clearly enunciated in Duncan v. Louisiana, supra at 156:

"Those who wrote our constitutions knew from history and experience that it was necessary to protect against . . . judges too responsive to the voice of higher authority."

* * *

". . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge."

More recently, in Taylor v. Louisiana, 419 U.S. 522, 530 (1975) one of the purposes of the jury system was recognized as being:

". . . to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community . . . in preference to professional or perhaps overconditioned or biased response of a judge. . . . (Citation omitted.)

Because of this fear of judicial power; because of "the belief that imposition of the death penalty ought to reflect more of a community consensus than can be marshalled by one man,"⁴ and because "[t]he magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society, Marion v. Beto, 434 F. 2d 29, 32 (5th Cir. 1970), decisions upon sentencing an accused to death have historically been reserved to the legislature through mandatory sentence or the jury. Where discretion is to be exercised, jury responsibility for the imposition of the death penalty has been recognized as "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Thus it is not surprising that when state legislatures turned from mandatory to discretionary sentencing procedures in capital cases, it was the jury, and not the trial judge, in whom the discretion was vested. See McGautha v. California 402 U.S. 183, 200 (1971).

⁴ A.B.A. Standards, Sentencing Alternatives and Procedures, commentary to § 1.1(c) [Approved Draft (1968)].

Until 1974, Ohio exemplified that trend. In 1788 the governing body of the Northwest Territory--of which Ohio was a part--enacted statutes providing for capital punishment upon conviction for treason, murder, and arson where death occurs. Upon conviction the death sentence was mandatory: neither judge nor jury had any discretion in the matter. Ch. VI, Laws Passed in the Terr. of the U.S. North-West of the River Ohio.

Though the offenses for which the death penalty was applicable were changed from time to time, the sentence of death continued to be a mandatory one until April 23, 1898. On that date, the jury was vested with the power to preclude the imposition of the death penalty upon one convicted of murder in the first degree. S.B. No. 504 [To amend section 6808 of the Revised Statutes of Ohio.] 93 Ohio Laws 223. Provisions substantially the same continued until January 1, 1974 when current provisions of the Ohio Revised Code took effect. By its provision, Judges were made the triers of fact upon the issue deciding life and death. Thus, for 186 years, no judge was ever given the power of life and death.

A survey of the applicable statutes in 1948 indicated that four states retained a mandatory death penalty; five states had abolished the death penalty, and in 39 states the choice between death and life imprisonment was left to the jury. Andres v. United States 333 U.S. 740, 767 (1948). At that time no state allowed a judge to participate in making the actual decision as to who was to live and who was to die. Similarly, a survey of the post-Furman death penalty statutes indicates that the overwhelming number of states have continued to honor the right of an accused to have the issue of death or life passed upon by a jury of his peers.

5

Other than Ohio, it appears that only four states allow the judge to make the ultimate decision as to life and death. Ariz. Rev. Stat. §13-454 (D); Fla. Stat. Ann. §921; Mont. Rev. Code Ann. §94-5-105(1); Neb. Rev. Stat. §29-2523(2); Ohio Rev. Stat. §2929.0.

Ohio's departure from this standard seems to have been occasioned by confusion over the meaning of this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). When the legislature was making a pre-Furman comprehensive revision of the state criminal code the first version of the bill which eventually enacted provided for a jury determination of whether an individual convicted of aggravated murder would live or die.⁶ This provision was retained in the substitute bill which was later introduced. Though various amendments were proposed to the substitute bill, no one attempted to vest the trial judge with any responsibility for the decision upon capital punishment.⁷ This Court's decision in Furman was rendered after the substitute bill had been passed by the State House of Representatives and was pending before the State Senate Judiciary Committee.⁸ It has in its efforts to conform the new provision to what it viewed as the Furman requirement that the Judiciary Committee eliminated the jury from the decision upon capital punishment.⁹

This mistake--though understandable--does not change the underlying difficulty with the statute. Both reason and history suggest that jury decision-making upon the imposition of capital punishment is a value ingrained in both the eighth and fourteenth amendments.

Because the right to a jury trial is so fundamental; because the consequences of the death penalty are so profound; and because Ohio's departure from the time-honor precluding judges from participating in the decision upon whether to impose capital punishment was initiated by confusion engendered by this Court's decision in Furman v. Georgia, supra, review by this Court is merited.

⁶ Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 Cleve. St. L. Rev. 8, 16 (1974).

⁷ Id. at 17-18.

⁸ Id. at 18.

⁹ Id. at 20.

The State has established no compelling state interest which would justify depriving petitioner of his fundamental right to life.

The Massachusetts death penalty was found to be violative of that State's constitution in Commonwealth v. O'Neal, 339 N.E. 2d 676 (Mass. 1975). In his concurring opinion Chief Judge Tauro utilized state due process of law analysis which is equally susceptible to application under the due process clause of the Fourteenth Amendment.

Such analysis highlights one of the major deficiencies of Ohio's attempt to resume the practice of execution and may be summarized as follows:

The Fourteenth Amendment guarantees that states cannot deprive a person of his life without due process of law. Life is the most fundamental right of all: without it an individual would have no rights, fundamental or otherwise. In order to be sustained a statute depriving an individual of a fundamental right must be the least onerous means of furthering a compelling state interest. Thus, a death penalty statute which seeks to deprive a person of his life triggers a strict scrutiny under the compelling state interest and least restrictive means test.

The death penalty serves two principal purposes: deterrence of capital crimes by prospective offenders and retribution. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 2930 (1976) (plurality). While Petitioner does not dispute that society has a compelling state interest in deterrence sufficient to imprison those convicted of murder, the results of empracle studies have been inconclusive as to the deterrent effect of the death penalty vis a vis imprisonment. Gregg v. Georgia, supra. There "is no convincing empracle evidence either supporting or refuting" the view that the death penalty may not function as a significantly greater deterrent force than lesser enalties." Gregg v. Georgia, supra at 2931. (footnote omitted).

Consequently under both the compelling state interest test and the least restrictive means test deterrence cannot be utilized to justify the death penalty in lieu of imprisonment. Further, though retribution is not a forbidden objective, it neither requires death in order to be satisfied nor rises to the level of a compelling state interest. Thus, since the State of Ohio is unable to demonstrate any compelling state interest justifying the execution, as opposed to the incarceration of the petitioner, the Ohio statutory scheme is unconstitutional and Petitioner's sentence of execution is void.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MITIGATION FACTORS LISTED IN OHIO CAPITAL PUNISHMENT STATUTE ARE UNCONSTITUTIONALLY LIMITED IN THAT:

1.

TWO OF THE THREE MITIGATING FACTORS PROVIDED IN THE CAPITAL PUNISHMENT STATUTE FAIL TO PARTICULARIZE CONSIDERATION OF THE RELEVANT ASPECTS OF THE CHARACTER AND RECORD OF EACH CONVICTED DEFENDANT BEFORE THE IMPOSITION UPON HIM OF A SENTENCE OF DEATH.

2.

THE SOLE MITIGATING FACTOR WHICH ADDRESSES THE CHARACTER AND RECORD OF THE ACCUSED IS ILLUSORY AND FAILS TO PROVIDE AN ADEQUATE STANDARD BY WHICH A DEFENDANT CAN EXONERATE HIMSELF FROM THE DEATH PENALTY.

INTRODUCTION

Last term, this Court struck down the Death Penalty Statutes in North Carolina and Louisiana, since those states had misread this Court's opinion in Furman v. Georgia, 408 U.S. 238 (1972) by attempting to meet the requirements of the Eighth and Fourteenth Amendments by removing all sentencing discretion from the judge and jury. Woodson v. North Carolina, 428 U.S. 280, 300 (1976); Roberts v. Louisiana, 428 U.S. The Ohio Legislature, in enacting the state's death penalty statute, also misread this Court's opinion in Furman, supra, since it is clear that the legislative intent was to retain the death penalty, ". . . but to remove from the judge and jury as much discretion as possible in the punishment determination procedure."¹⁰

The death penalty statute enacted by the legislature provides only three mitigating factors by which a defendant who has become an

¹⁰ Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code. 23 Cleve. St. L. Rev. 8, 20 (1974).

automatic candidate for the death penalty¹¹ can exculpate himself. The Ohio statute appears to be unique in relation to capital punishment statutes already reviewed by this Court last term, since in Ohio the defendant has to establish by the preponderance of evidence, one of the mitigating factors.¹² By comparison to the statutes in Florida,¹³ Georgia,¹⁴ and Texas¹⁵ which have passed constitutional scrutiny by this Court, Ohio's mitigation factors are extremely narrow. Thus, the Ohio law does not establish "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death" (Woodson v. North Carolina, supra, at 428 U.S. 303), but for practical purposes is a mandatory death penalty.¹⁶

11 Ohio Revised Code 2929.03(D) provides that if the Defendant fails to establish one of the mitigating circumstances by a preponderance of the evidence the Court "shall impose the Penalty of Death on the offender."

12 Ohio Revised Code 2929.04(B). The trial judge, in imposing the death penalty in Petitioner's case found that Petitioner had not met his burden of proof. This principle of the defendant's burden of proof at the mitigation hearing was affirmed in the Ohio Supreme Court opinion in State v. Sandra Lockett, 49 Ohio St. 2d 48, 66-67 (1976).

13 The Florida statute reviewed by this Court provided seven specific mitigating circumstances, four of which are noticeably not present in the Ohio statute, such as the defendant's age, prior record, his role in the offense, and more broadly defined mental and emotional disturbances and impairments. Proffitt v. Florida, 428 U.S. 242, 248 Fn. 6 (1976); see State v. Bayless, 49 Ohio St. 2d 75 at 86-87 (1976) (for comparison of Florida statute with Ohio).

14 As this Court noted in Gregg v. Georgia, 428 U.S. 158 (1976), the Georgia capital punishment statute allows any mitigating factor provided by law to be presented by the defendant at the sentencing trial, including youth, extent of cooperation with the police, and emotional state at the time of the crime. Gregg, supra, at 428 U.S. 197.

15 Although the Texas statute did not delineate a mitigating circumstance, this Court recognized by case law that the defendant could present any mitigating factor at his sentencing trial, including age, mental and emotional state, and lack of prior criminal record. Jurek v. Texas, 428 U.S. 262, 273 (1976).

16 The Ohio Supreme Court has reviewed 20 post-Furman death sentences and reduced none.

TWO OF THE THREE MITIGATING FACTORS PROVIDED IN THE CAPITAL PUNISHMENT STATUTE FAIL TO PARTICULARIZE CONSIDERATION OF THE RELEVANT ASPECTS OF THE CHARACTER AND RECORD OF EACH CONVICTED DEFENDANT BEFORE THE IMPOSITION UPON HIM OF A SENTENCE OF DEATH.

At the mitigation stage of the trial, the death penalty is mandated unless the defendant convicted of aggravated murder with specifications proves one of the following factors by a preponderance of the evidence:

- (1) The victim of the offense induced or facilitated it.
- (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Ohio Rev. Code 2929.04(B).

On its face, the statute only meets the constitutional requirement of "particularized considerations of relevant aspects of the character and record of each defendant before the imposition upon him of a sentence of death" in criteria three. Woodson v. North Carolina, supra, at 303. As to mitigating factor (1), the conduct of the victim in facilitating his own death, clearly the character and record of the defendant has no relevance.

While the defendant's background is relevant to considering the concepts in mitigating circumstance (2) of duress, coercion¹⁷ and strong

¹⁷ The issue of duress and coercion has arisen in two cases, State v. Woods, 48 Ohio St. 2d 127 (1976), and State v. Bell, 48 Ohio St. 2d 270 (1976). In Woods, supra, the court gave an admittedly broad definition of duress and coercion in application, however, the court appeared to overlook its own definition. In Woods, the defendant had no prior record, was easily led, and was dominated by others, especially his co-defendant, Reaves, who had planned the actual robbery. Since Woods did not abandon his criminal conduct before the shooting (in which case he would have escaped capital punishment altogether) the court did not reduce his sentence. By the same token, in Bell, supra, the court refused to reduce the defendant's sentence although he was only 16, and also easily led by his adult companion, Hall. Since he had not abandoned his criminal conduct after the crime was committed. Bell, supra, 48 Ohio St. 2d 282. Both these cases are examples of Ohio Supreme Court's refusal to judge "individual culpability" of each defendant instead of reviewing on the basis of the "category of the crime committed." See Roberts v. Louisiana, supra, 428 U.S. at 222.

provocation¹⁸ its application to the class of death penalty candidates has so far been extremely limited and almost non-existent.

2.

THE SOLE MITIGATING FACTOR WHICH ADDRESSES THE CHARACTER AND RECORD OF THE ACCUSED IS ILLUSORY AND FAILS TO PROVIDE AN ADEQUATE STANDARD BY WHICH A DEFENDANT CAN EXONERATE HIMSELF FROM THE DEATH PENALTY.

The sole mitigating factor which allows the consideration of defendant's background and character is subsection (3) of 2929.04, which allows the defendant to prove that the crime was "primarily the product of" his "psychosis or mental deficiency." Since a "psychotic" offender, in all probability would not be found criminally responsible for his actions, in practice, the consideration of the accused's life and character will turn on the interpretation of "mental deficiency."

The phrase "mental deficiency" in psychiatric terms has been synonymous with mental retardation. The first death penalty case decided by the Ohio Supreme Court, State v. Bayless, 48 Ohio St. 2d 73 (1976) adopted this

18 The mitigating factor that "it is unlikely that the offense would have been committed but for the fact that the offender was under . . . strong provocation," Ohio Rev. Code 2929.04(B)(2) has not been an issue in any of the twenty (20) capital cases reviewed by the Ohio Supreme Court. The above section is for all intents and purposes identical to the Ohio Criminal Code definition of voluntary manslaughter:

"No person while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another."
(Emphasis added.)

Ohio Rev. Code §2903.03

Thus a defendant in Ohio who kills his victim under serious or strong provocation sufficient to raise a reasonable doubt to the jury would be guilty of voluntary manslaughter and would not be subject to the death penalty. Alternatively, if the defendant was unable to convince the trier of fact at trial that he acted under strong provocation sufficient to raise even a reasonable doubt, it is doubtful if he could convince the trial judge by a preponderance of the evidence at his mitigation hearing. Therefore the availability of this mitigating factor is at best speculative.

interpretation.¹⁹ Relying on this definition, Petitioner established at his mitigation hearing that he is a borderline mentally retarded, has the education equivalent to a child in the second grade, and that as a result of his mentality he cannot be expected to form the same good judgment as a normal person, especially under stress.

The Supreme Court held, however, that Petitioner was not a mental deficient, even though he has an IQ of 76 with a performance IQ of 71. Further, Petitioner's educational deficiencies were not relevant to considering whether he was mentally deficient. To emphasize the type of appellate review done in reviewing the mitigation hearings and death sentences of Ohio defendants, the Supreme Court held:

"In criminal appeals, court will not retry issues of fact. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered." (Emphasis added.)²⁰
Edwards, supra, at 47.

After Petitioner's case was affirmed, possibly in concern over the scrutiny this Honorable Court would place on the narrowness of the statutory mitigating factors, the Supreme Court of Ohio enlarged the definition of "mental deficiency." The new interpretation of "mental deficiency" became:

¹⁹ Justice Stern, speaking for the court, held:

"Mental deficiency is consistently defined to mean low or defective state of intelligence."
State v. Bayless, supra at 95-96.

Notably one justice, Justice Hebert did not concur in this definition.
Bayless, supra, at 112.

²⁰

The above statement typifies the type of blatant disregard by the Ohio Supreme Court for constitutional mandated appellate review in death penalty cases:

". . . to determine independently whether the imposition of the ultimate penalty is warranted . . . and to ensure that they [the death sentences] are consistent with other sentences imposed in similar circumstances."
Proffitt v. Florida, supra, at 253.

". . . Any mental state or incapacity may be considered in light of all the circumstances and including the nature of the crime itself. . . ."
State v. Black, 48 Ohio St. 2d 262, 269 (1976).²¹

This reinterpretation, Petitioner submits, is sometic only since to date neither he nor any other defendant sentenced to death has demonstrated sufficiently to the Supreme Court of Ohio that they are mentally deficient and that the crime was primarily a product of that deficiency.²²

The accused in Ohio convicted of aggravated murder with specifications have the burden of proof in establishing mitigating factors such as "mental deficiency" but as of yet such factors have not been adequately explained by the highest court in the state. Surely a defendant facing a death sentence is entitled to the same constitutional due process rights of adequate notice and definitive standards in statutory wording as an accused faced with any type of criminal charges, to safeguard against "arbitrarily and discriminatory application" of criminal statutes. Graynod v. City of Rockford, 408 U.S. 104 at 108-109 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971). Based on the conscious failure of the Ohio Supreme Court to provide a standard for mitigating circumstances, the Ohio death penalty statute is inherently vague and the ability of the accused to avoid the death penalty is illusory.

21 Interestingly, three justices of the Supreme Court, (Justices Stern, Celebrezze and W. Brown), while concurring in the judgment in Black, supra, did not concur in the interpretation of "mental deficient," evidencing a division of the court as to the meaning of mental deficient.

22 In these cases no mitigation of mental deficiency was found: State v. Harris, 48 Ohio St. 2d 351 (1976) (defendant was seventeen, a sociopath, had low intelligence and an IQ of 72); State v. Royster, 48 Ohio St. 381 (1976) (defendant had an "IQ of 75 in 1962; 61 in 1966 and 54 in 1968," *Id.* at 389); State v. Lockett, 49 Ohio St. 2d 48 (defendant had below average intelligence and was under the influence of methadone); State v. Bell, 48 Ohio St. 2d 270 (1976) (defendant was 16 years old and unable to cope with demands of the educational system).

F.

The Ohio Courts have failed to properly review Ohio's death penalty cases.

"It is now clear that the sentencing process as well as the trial itself, must satisfy the requirements of the Due Process Clause."

Gardner v. Florida, — U.S. ___, 20 Cr. L. 3083, 3085 (March 22, 1977).

Plenary appellate review of death sentences serves as an "important additional safeguard against arbitrariness and caprice." Gregg v. Gregg, supra, at 2937. The cases of Gregg, Proffitt, Jurek, Woodson, and Roberts have been held to require "meaningful appellate review designed to determine whether the imposition of the death penalty is warranted in any given cases." Jackson v. Mississippi, No. 49, 178, p. 21 (Mississippi Supr. Ct. 1976), 337 So. 2d 1242, 1255 (Miss. 1976).

In Ohio a person sentenced to death has an appeal as of right to the Ohio Supreme Court. Section 2, Article IV, Ohio Constitution. But, as demonstrated below, the system of appellate review in the state of Ohio cannot pass constitutional muster.

First. There must be an adequate trial record in order to allow for effective review. Even in civil litigation the parties are assured of receiving findings of fact and conclusions of law. Ohio Civil Rule 52. And in the context of a criminal proceeding, it has been held that trial courts should make specific findings of fact to support rulings upon suppression motions, United States v. Gusan, 549 F. 2d 15 (7th Cir. 1977); that such findings are always advisable with respect to the reasons for rendering a particular sentence, United States v. Carden, 428 F. 2d 1116, 1118 (8th Cir. 1970); and that in state speedy trial proceedings "sufficient facts and reasons be set forth in the record to support the court's decision." State v. Messenger, 49 Ohio App. 2d 341 (1976). Indeed, as was said in Gardner v. Florida, — U.S. ___, 20 Cr. L. 3083 (March 22, 1977):

". . . Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, ___ U.S. ___, No. 75-506 (July 2, 1976) Slip op., at 7-9, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." (Footnote omitted.)

But the Ohio trial courts continuously fail to make detailed findings necessary for effective appellate review. In Petitioner's case, for example, the April 1975 Journal Entry speaks to this issue only to this extent:

"The Court having heard testimony in the matter presented on April 29, 1975, and upon due consideration hereof, finds that there are no mitigating circumstances present."

(App. 34).

Similarly, the transcript of the mitigation hearing contains only the Court's ultimate conclusions and nothing that can be said to even approach specific findings of fact.²³ In an effort to demonstrate to the Court that this

23 That portion of the transcript reads as follows:

COURT: The Court has reviewed all the testimony pertaining to mitigation; has reviewed the reports as well as the statement made by the witnesses that appeared on his behalf; the Court has read the Pre-Sentence Report. The Court, in reviewing the case finds that the preponderance of the evidence does not in this particular case, as far as mitigation is concerned the Court found that the aggravated murder of Joseph Eschack was not the product of the offender's psychosis or mental deficiency, and therefore finds no mitigation to consider in this particular case.

Needless to say, the Court was affected by the background of this boy, or this man I should say, living under the conditions that he had to live and responding the way he responded through all the conditions and the Court was sympathetic in that regard, but the Court in fair conscience could not find that there was mitigation in this case.

The Court appreciates the fact that a lot of his friends who worked with him throughout the years came and spoke on his behalf, but again the mitigation, (continued p.40)

deficiency in the articulation of facts is not a problem limited only to Petitioner, there is set forth in the Appendix relevant journal entries and transcript pages from State v. Hines, No. 5302 (CP Ashland County) and State v. Perryman, No. 75-3-436 (CP Summit County). (App. 170-179).

In matters as important as these a defendant has a right to the specific finding of facts that underlie the Court's ultimate resolution of the question of mitigation. Any lesser standard violates due process.

Second. The Ohio Supreme Court itself has shown an indifferent regard for integrity of the record upon which review predicated. In State v. Woods, 48 Ohio St. 2d 127, 134 n. 3 (1976) the Court noted:

"One difficulty in considering the claims for mitigation in this case is that the pre-sentence report required to be made by statute does not appear in the record. This court bears a special responsibility in capital cases to assure that the ultimate penalty of death be imposed fairly and consistently, and that responsibility requires that we independently evaluate the evidence of aggravation and mitigation upon which each death sentence is based. For that reason, pre-sentence reports and other information relevant to the appropriateness of the death sentence should properly be included in the record of each case brought to this court as a matter of right because the appellant's sentence of death has been affirmed by the Court of Appeals."

In spite of this deficiency and in spite of its power to supplement the record by ordering the report to be deposited with the Court, e.g. State v. Roberts, 50 Ohio App. 2d 237, 251 (1977), the Ohio Supreme Court proceeded to analyze the merits and affirm the conviction without the availability of the reports.

Third. At least with respect to Petitioner's case, the Court below has demonstrated that it did not examine the record with the type of serious scrutiny that should be given to a case which may result in the death.

As set forth more fully, beginning at page 47, infra, the Ohio Supreme Court erroneously concluded that a psychiatric evaluation ordered by

(continued) the preponderance was not there and the Court felt that you, Mr. Chuparkoff, have done an excellent job in presenting his side of the case, both during the trial and through the mitigation. The Court knows the burden that was placed upon you, as well as the State.

Now, it's my duty to sentence Mr. Edwards.

the trial court was for purposes of determining competency when a close examination of the record would have clearly revealed that the psychiatrist was asked to, and did in fact, examine Petitioner with respect to one of the mitigating factors which, if established, would preclude imposition of the death penalty.

The Court made a similar mistake with regard to the identity of one Mack Newberry. In attempting to justify the decision of the trial court in allowing officer Ronald Davis to testify for the state, even though his name did not appear on the witness list, the Ohio Supreme Court stated:

"Although the witness list was incomplete, it did include the name of Mack Newberry, the partner of Ronald Davis, who accompanied him on his tour of duty. It was the intention of the state to call Newberry as its first witness, but a heart attack the night before trial precluded his appearance, and Davis was called in his stead."

State v. Edwards, 49 Ohio St. 2d 31, 42 (1976).

The transcript clearly shows that Newberry was an individual who lived in the neighborhood where the victim died (T. pp. 293, 341). Contrary to the conclusion of the court below, Mr. Newberry was a black male, 77 years of age, who was neither a policeman or the partner of officer Ronald Davis (App. p. 184).

Fourth. Of equal concern is the likelihood that the court below did not devote any serious attention to the briefs prepared by counsel. The mistake with respect to Mr. Newberry was also one which the Court of Appeals had initially made. Upon appeal to the Ohio Supreme Court, counsel for the Petitioner pointed this error out in his brief and cited transcript pages which were relevant to that, explaining to the Court that Mr. Newberry was not a police officer. In spite of this effort, the error was republished in the Ohio Supreme Court's opinion. (App. 181-182).

Fifth. In State v. Bayless, 48 Ohio St. 2d 73, 86 (1976) the court below indicated that it had:

". . . a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." (Emphasis added.)

See also State v. Woods, 48 Ohio St. 2d 127, 134 n. 3 (1976) and State v. Strodes, 48 Ohio St. 2d 113, 117 (1976).

In spite of this commitment to "independent review" it is worthy of note that as of this date the lower court has not reversed a single case nor reduced a single sentence as a result of its independent review.

Further, it is evident that by "independent" review the Ohio Court does not mean a plenary weighing of the sentencing factors as is done in Florida, E.g., Swan v. State, 322 So. 2d 485, 489 (Fla. 1975). Indeed, when Petitioner sought to have that court consider the evidence upon the issue of mental deficiency, the Court responded thusly:

"In criminal appeals, this court will not retry issues of fact. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered. From the evidence before it, the trial court had more than sufficient evidence to support its judgment. (Emphasis added.) (Citation omitted.)

State v. Edwards, supra at 47.

Since this is the same standard that is applied to all criminal cases, the Court's "independent review" seems to be illusory.

Other deficiencies in the review Ohio accords to those sentenced to death are set forth above in division "E" which discusses the Court's treatment of the mitigating factors. Further examples can be expected to be presented on an individual basis as the remaining petitions for certiorari are filed. But Petitioner believes that the foregoing is sufficient to indicate that the Ohio Courts had not taken their duty to review capital cases as seriously as they are required to.

Because the Ohio Courts have not adhered to the high standards of appellate review as Florida, Georgia, and Texas have, the judgment of this Honorable Court is necessary to set forth the constitutional boundaries within which state appellate courts must function when reviewing capital cases.

G.

Ohio capital sentencing procedures impermissibly penalize exercise of the right to trial by jury.

Petitioner submits that the Ohio statutory scheme improperly and unnecessarily penalized the exercise of this right to trial by jury and concurs fully in the apt argument of the law upon this issue submitted by the petitioner in Carl L. Bayless v. State of Ohio, Petition for Writ of Certiorari (pending):

"United States v. Jackson, 390 U.S. 570 (1968) stands for the proposition that the right to a jury trial is unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which the right is waived. See also, Funicello v. New Jersey, 403 U.S. 948 (1971) (per curiam); Atkinson v. North Carolina, 403 U.S. 948 (1971) (per curiam). This is so because such a scheme "needlessly encourages" the waiver of the right to have one's guilt determined by a jury. Id. at 588. Yet, under Ohio capital sentencing procedures the defendant who elects to be tried by a jury must forego the benefit of having his fate determined by a panel of judges rather than by a single judge. This benefit is, of course, considerable:

'A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With such an issue as the death penalty involved, the possibility and availability of disagreement are advantages that cannot be disregarded. The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weigh in the balance. Judges are presumed to have the fortitude to carry out their responsibilities.'

Rainsburger v. Foglaine, 380 F. 2d 783, 785 (C.A. 9, 1967). And, since there is no justification for conferring the benefit upon some, but not all capital defendants, it can not legitimately serve as an inducement to forego trial by a jury of one's peers."

H.

The Ohio statutory scheme for capital punishment contains a substantial risk that capital punishment will be inflicted in an arbitrary and capricious manner.

Initially, Petitioner contends that the Ohio statutory scheme is arbitrary and capricious. This is so because the legislature has provided that a murder which results from prior calculation and design is aggravated murder without any specification and consequently without any risk of receiving the death penalty. Compare Ohio Revised Code sections 2903.01(A) and 2929.04. At the same time, the Ohio Legislature mandated that those whose actions take the life of another during the commission of a felony (similar to the common law murder-felony rule) have committed aggravated murder with a specification and consequently may be subjected to the death penalty unless mitigating circumstances are proven by a preponderance. Ohio Revised Code sections 2903.01(B) and 2929.04(A)(7). The Ohio statutes thereby operate to preclude from capital punishment the perpetrator of the most premeditated and heinous murder, and at the same time to create a presumption of capital punishment for even the most accidental and unintended death which occurs during the commission of a felony. Similarly, the Ohio statutes dealing with the death penalty for felony-murder admit to no particularized consideration of the culpability of the individual when more than one party is involved. It blindly mandates the death penalty for principals and aider and abettor alike, without any regard to their actual knowledge, participation or culpability in the death. E.g., State v. Lockett, 49 Ohio St. 2d 48 (1976).

Petitioner submits that the Ohio Legislature has not merely allowed, but rather had mandated the use of capital punishment in an arbitrary and capricious manner.

Further, the statutory system is suspect of being applied in an arbitrary and capricious manner.

First. In Ohio, as in most states, the prosecutor has tremendous discretion in determining both the ultimate charge against the accused and in plea bargaining. Obviously, such discretion encompasses the opportunity for both good faith mistakes and for abuse. The possible constitutional problem with such a system were briefed before this Court in the last two terms. See Fowler v. North Carolina, No. 73-7031, Brief for Petitioner, pp. 45-61; Woodson v. North Carolina, No. 75-5491, Brief for Petitioners, pp. 28-32; Gregg v. Georgia, No. 74-6257, Brief for Petitioner, pp. 18-20; Jurek v. Texas, No. 75-5394, Brief for Petitioner, pp. 29-40.

Though the existence of such discretion alone is not enough to demonstrate a constitutional infirmity, e.g., Gregg v. Georgia, supra, at 2937, Petitioner submits that if empirical data were available which demonstrate that through the exercise of such discretion or its abuse, those individuals who were given the death penalty were selected in an irrational, arbitrary, or capricious manner, then the death penalty of this state would be unconstitutional under this Court's decision in Furman v. Georgia, supra.

The Ohio Department of Mental Health and Mental Retardation keeps detailed statistics upon each Ohio criminal case which traces the history of each case from indictment through disposition and contains other relevant information with respect to age, sex, and race of each defendant. A copy of the form used to collect this data is reproduced in the Appendix at page 180. Though such documents are Public Records to which Petitioner has an absolute right of access. See Ohio Revised Code Section 149.43, as of the date of the preparation of this petition he has been unable to convince that

agency of the state to allow him access to such information. Nevertheless, Petitioner will obtain that data either by agreement or mandamus. Based upon partial statistics that Petitioner has gathered through the cooperation of the courts in sixty of Ohio's eighty-eight counties, Petitioner submits, upon information and belief, that the more complete and reliable statistics in the possession of the State of Ohio would be relevant to whether or not Ohio's statutory system of capital punishment is being utilized in an arbitrary and capricious fashion.

Second. There have been instances where a death sentence has not been imposed because a mitigating circumstance was found. Given the illusory nature of the mitigation portions of the Ohio statute as discussed above, this raises the question of whether judges in the state of Ohio are acting in such a manner as to make the death penalty in Ohio one that is arbitrary and capriciously imposed. This can be easily ascertained by reference to the transcripts once those mitigated cases are identified through the information in the possession of the Ohio Department of Mental Health.

Accordingly, Petitioner asks that this Court consider the fact that the Ohio statute itself mandates arbitrary and capricious infliction of death and to evaluate statistical data concerning Ohio's current statutory scheme in order to determine whether that penalty is being applied in an arbitrary or capricious manner.

II.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ACTION OF THE STATE TRIAL COURT IN REQUIRING PETITIONER TO SUBMIT TO A PRE-TRIAL PSYCHIATRIC EVALUATION WITH RESPECT TO A MITIGATING FACTOR WHOSE EXISTENCE COULD PRECLUDE THE IMPOSITION OF THE DEATH PENALTY AND MAKING SUCH REPORT AVAILABLE TO BOTH THE JUDGE AND THE PROSECUTOR VIOLATES PETITIONER'S RIGHTS UNDER THE FIRST, FOURTH, SIXTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to commencement of Petitioner's trial, the state trial judge ordered Petitioner to submit to a psychiatric evaluation (App. at 141). Though the Ohio Supreme Court concluded that this was "apparently" an examination under Ohio Revised Code Section R.C.2945.37 to determine whether or not Petitioner was competent to stand trial,²⁴ State v. Edwards, 49 Ohio St. 31, 36 (1976) (App. at p. 4.) an examination of the record clearly and unmistakably reveals that this evaluation was for purposes of determining whether or not Petitioner should be sentenced to death in the event of his conviction. The facts demonstrating that this pre-trial psychiatric evaluation was in fact taken for the purpose of considering whether the mitigating circumstances of mental deficiency existed include the following:

(1) The Court's January 28, 1975 letter to Dr. Elliot Migdal, the examining psychiatrist, fails to make any mention of Ohio Revised Code Section 2945.37 or to ask Dr. Migdal to evaluate Petitioner's competency to stand

²⁴ There are only two weak references in the record upon which the Ohio Supreme Court's conclusion could have been based:

(1) After defense objections to the evaluations the state prosecutor, while admitting that he didn't know why the evaluation was conducted, suggested that it might be justified as an inquiry into competency (T. 185-186; App.40-41) at

(2) The trial court, apparently speaking of its general procedure in capital cases, indicated that he had psychiatric evaluation conducted prior to trial "to determine whether or not this person should stand trial, at least to get an insight into this particular person. . . ." (T. 184; App. at 39).

In evaluating the claim that this evaluation was for purposes of determining Petitioner's competency to stand trial it is noteworthy that the record is devoid of any suggestion that Petitioner was not competent to stand trial and no hearing was ever had upon the issue of competency.

trial. To the contrary, the trial judge told Dr. Migdal that he had been appointed to examine petitioner "as to his mental condition;" citing Ohio Revised Code Sections 2929.03(D) and 2947.06 pertaining to the death penalty and "mental deficiency" as a mitigating factor; and instructed Dr. Migdal that:

"The one question to be considered in this case is whether or not the Defendant has a mental deficiency."
Letter to Dr. Elliot Migdal, filed January 28, 1975
(App. at 139-140)

(2) The content of the letter sent to Dr. Migdal for this pre-trial evaluation is identical to the letter sent to Dr. Abdon Villalba for the post-conviction psychiatric evaluation required under Ohio Revised Code Section 2929.03(D). (Compare App. at 139-140 with App. at 149-150).

(3) Dr. Migdal's letter to the Court dated February 12, 1975 fails to address the issue of competency to stand trial, but rather considers the question of the existence of the mitigating factor of mental deficiency and includes standard pre-sentence report information concerning Petitioner's background and the offense in question. Compare Rule 32.2(B) of the Ohio Rules of Criminal Procedure; Rule 32(C) of the Federal Rules of Criminal Procedure. This record admits to no other conclusion but that this evaluation was, in both form and function, a presentence or mitigation hearing report.

Pursuant to the Journal Entry of February 4, 1975, (App. at Dr. Migdal interviewed the Petitioner at the Summit County Jail on February 5, 1975. An examination of Dr. Migdal's letter reporting the results of that interview indicates that he not only gained information concerning the Petitioner and his background, but that he also elicited details of the events

5

Petitioner does not believe that the label given to the doctor's letter is of any constitutional significance. As the Ninth Circuit concluded in United States v. Montecalvo, 553 F. 2d 1110, 1112 (9th Cir. 1976):

"The label on the file has no significance. The content of the file is what counts. . . ."

"The term presentence report . . . is not a term of art. It is a shorthand expression intended to encompass any report that contains the kind of information described in Rule 32(C)(2)" (Footnote omitted.)

in connection with the crime with which Petitioner was charged. Indeed, more than half of Dr. Migdal's letter of some three pages is devoted to a recitation of the details concerning the shooting and his analysis of the inferences that could be drawn from the information Petitioner related to him.

Subsequently, on February 12, 1975, counsel for the Petitioner filed a "Motion to Restrict Use of Psychiatric Report." By that motion Petitioner argued that the court did not have the authority to order such an examination prior to conviction and that such report would be prejudicial to his rights if it were made available to the prosecutor and to the court. Consequently, Petitioner asked that the report not be made available to either the court or the prosecutor, "unless and until defendant has been found guilty of the crime of aggravated murder," (App. at 142) The record fails to disclose that any hearing was held upon this motion until March 5, 1975. At that time it is evident from a reading of the transcript that the report had already been given to both the prosecutor and the court. The trial court held that in spite of Petitioner's objection, there was no error, and overruled Petitioner's motion in that regard (T. 187; App. at 42).

Petitioner respectfully submits that the action of the trial court in compelling him to submit to such a psychiatric examination prior to conviction and making its results available not only to the court but also to the prosecutor violated his rights to due process of law. The fundamental unfairness of making such information available to either the judge or the state prosecutor is demonstrated by reference to the A.B.A. Standard and the Federal Rules of Criminal Procedure. The A.B.A. Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968), Section 4.2, provides that a presentence report may be initiated prior to trial only if the defense consents, and:

"(ii) adequate precautions are taken to assure that nothing disclosed by the presentence investigation comes to the attention of the prosecution, the court or the jury prior to adjudication of guilt."

Similarly, Rule 32(c) of the Federal Rules of Criminal Procedure provides that a presentence report:

". . . shall not be made to the court or its contents disclosed to anyone else unless the defendant has pleaded guilty or has been found guilty."

See also Evjen, Some Guide Lines in Preparing Presentence Reports, 37 F.R.D. 177, 178.

The importance of the values sought to be protected by these rules was emphasized by this Court in Gregg v. United States, 394 U.S. 489, 491-492 (1969) in its interpretation of Rule 32 when it said:

". . . the report must not, under any circumstances, be 'submitted to the court' before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes error of the clearest kind."

Indeed, this Court stated in Gregg that there was no justifiable reason for a trial court to receive such information prior to conviction and that consequently:

"No trial judge, therefore, should examine the report while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 intended to avoid.

Gregg at 491-492.

As set forth in the Commentary to § 4.2 of the A.B.A. Standards: "The possibilities of prejudice are obvious." For this reason this Court's decision in Gregg has been interpreted to create a per se requirement of reversal where the trial court receives a copy of a presentence report prior to an adjudication of guilt. E.G., United States v. Montecalvo, 533 F. 2d 1110 (9th Cir. 1976); United States v. Park, 521 F. 2d 1381 (9th Cir. 1975).

Petitioner submits that the due process clause of the Fourteenth Amendment to the Constitution of the United States gives him the very same

protection against the unfairness of having a report of this nature disclosed to the judge and the state prosecutor as does Rule 32 of the Federal Rules of Criminal Procedure and that the error in disclosing this type of information is so fundamentally unfair as to require the application of the per se reversal rule. Indeed, given the great potential for prejudice and the difficulties of actually demonstrating that prejudice if it is denied by the state, Petitioner submits that in instances where a psychiatric report containing insights into the personality of an accused, along with incrimination information with respect to the crime of which he is charged, is received and read by both the trial judge and the state prosecutor prior to trial, prejudice must be presumed. See Gregg v. United States, supra; United States v. Montecalvo, supra; and United States v. Park, supra.²⁴

Though considerations of due process alone require that the petitioner be given a new trial, the facts and circumstances of this particular case are such that Petitioner can point to nine instances of actual or potential prejudice involving not only his right to due process, but several other constitutional rights.

First, the court ordered examination violated Petitioner's Fifth Amendment right to remain silent. Beyond peradventure of doubt neither the prosecutor nor the trial judge had the right to visit Petitioner in jail and compel him to reveal to them facts and information concerning the crime with which he had been charged. Petitioner's Fifth Amendment rights cannot be circumvented simply by the fact that it was the psychiatrist who asked the questions and reported the information back to the state.

Second, the mere existence of the psychiatrist's report "chilled" Petitioner's Sixth Amendment right to take the stand in his own behalf. Regardless of the ultimate resolution of the issue, it is apparent that if the

²⁴ Similar standards are applied in analogous situations where the potential for prejudice is great, but so are the difficulties of proof. E.g., Glasser v. United States, 315 U.S. 60 (1942) (ineffective assistance of counsel because of conflict of interest); Remmer v. United States, 347 U.S. 227 (1954) (F.B.I. agent interviewed juror about possible jury tampering by a third party.)

Petitioner took the stand and made any statements inconsistent with those which were purported to be recorded in the evaluation, then the prosecutor could make a credible argument to the Court that under the rationale of Harris v. New York, 401 U.S. 222 (1971), he had the right to impeach Petitioner by use of the psychiatric evaluation.

Third, the Petitioner was understandably reluctant to talk with the psychiatrist concerning the facts underlying the crime with which he was charged. The effect this had upon Dr. Migdal was apparent:

". . . it seemed to this examiner that the patient was making a deliberate attempt to avoid discussion of his present offense by going off on tangents regarding his past history."

Letter of February 25, 1975 (App. at 143)

Dr. Migdal characterized this as an attempt on Petitioner's part to "manipulate" the interview and concluded that such manipulation was one indicator that Petitioner was not mentally deficient (T. p. 668; App. at 143). That "manipulation" was described by Dr. Migdal as follows:

". . . I attempted to get the defendant to answer questions in relation to the crime [sic] which he had been charged, but he attempted to control the situation and manipulate it by avoiding discussion of the events by deliberately trying to concentrate on his past history and education . . ."

(T. p 665, App. at 119).

Had Doctor Midgal interviewed Petitioner after conviction rather than before, this "problem" would not have arisen and the conclusions of Dr. Migdal might have been different.

Fourth, the trial court was required to make numerous rulings whose results significantly affected the outcome of Petitioner's trial. The two most obvious questions involved the court's ruling upon whether or not to admit the statements Petitioner made to the police and whether or not the state had adduced sufficient evidence to establish the corpus delicti of the robbery offense. Had the statements been suppressed, it is apparent that the state could not have presented enough evidence to present the question

of guilt or innocence to the jury. If the court held that the state failed to establish the corpus delicti on the robbery offense, then the death penalty would have been precluded. In this context, the Court's knowledge of the contents of Dr. Migdal's report--which was not at all sympathetic to Petitioner--could have affected the court's judgment upon these close evidentiary issues. Petitioner submits that even the most conscientious Judge would be unable to completely realize the extent to which such report might affect his judgment upon these issues.

Fifth, for similar reasons, once the trial court had obtained this information, Petitioner was effectively prevented from exercising his right to waive jury trial and submit his case to the court. Rule 23 of the Ohio Rules of Criminal Procedure

Sixth, since the prosecutor indicated his belief that the psychological evaluation was consistent with information in the state's possession (T. p. 186; App. at 41) and since it was stated that the state did not believe all of the statements Petitioner had made to the police (T. pp 418-419; App. 76-77) it is reasonable to surmise that this evaluation reinforced the prosecutor's confidence in his case, thus diminishing prospects that the state would engage in any meaningful plea bargaining.

Seventh, the type of information contained in the psychological report is normally information which a client shares only with his attorney and which is protected from discovery by the state through the attorney-client privilege and the Sixth Amendment to the Constitution of the United States. By revealing this type of information to the state, the court not only gave the prosecutor's office invaluable background information for making trial decisions, but also effectively undermined Petitioner's right to effective assistance of counsel.

Eighth, the trial court's action unjustifiably violated Petitioner's right to privacy. This court has found the roots of a right of privacy in the first amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969), the fourth and fifth amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United

States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886); see Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); in the ninth amendment, *Id.* at 486-87; and in the concept of liberty guaranteed by the fourteenth amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This right is essentially the right to exist without governmental interference--to be able to erect certain sanctuaries, whether they be a home or an individual's mind, into which the government cannot intrude without consent. In essence, the right of privacy is "the right to be left alone . . . , Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) quoted with approval in Stanley v. Georgia, 394 U.S. 557, 564 (1969); a right which has been characterized as "a keystone of our legal philosophy" and as "one of the most cherished ideas of our form of democracy," State v. Siegel, 292 A. 2d 86, 88 (App. Md. 1972).

As was stated in Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Wayne County, Mich. Cir. Ct., July 10, 1973), summarized at 42 U.S.L.W. 2063 (July 31, 1973):

"There is no privacy more deserving of constitutional protection than that of one's mind."

"Intrusion into one's intellect, when one is involuntarily detained and subject to the control of institutional authorities, is an intrusion into one's constitutionally protected right of privacy. If one is not protected in his thoughts, behavior, personality and identity, then the right of privacy becomes meaningless."

Though conviction gives rise to a compelling state interest which would justify infringing upon an accused's right of privacy, no such interest exists prior to trial. Indeed, as this court recognized in Gregg v. United States, supra, at 491-492, there is no reason at all for a trial court to see pre-sentence reports prior to the time of conviction.

Thus, Petitioner seeks this Court's review of this issue with respect to his rights under the first, fourth, sixth, ninth and fourteenth

amendments to the United States Constitution. Given the importance of the issues raised and the unlikelihood that they will be addressed by the lower federal courts since Criminal Procedure Rule 32 provides a non-constitutional basis for resolving such questions, Petitioner respectfully submits that this is an issue worthy of certiorari.

III

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MERE RECITATION OF MIRANDA WARNINGS WITH A PURPORTED AFFIRMATIVE ANSWER AS TO THEIR MEANING COMPLIES WITH THE REQUIREMENT OF A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF THE RIGHT AGAINST SELF-INCRIMINATION, AND THE RIGHT TO ASSISTANCE OF COUNSEL BY PETITIONER WHO WAS A BORDERLINE RETARDED, HAD ONLY A SECOND-GRADE READING LEVEL AND WAS UNABLE TO READ THE MIRANDA WARNING CARD PRESENTED TO HIM.

The Petitioner was arrested along with another suspect, Haywood Manning, about 5:00 in the afternoon on January 9, 1975, by Akron police officers in connection with their investigation of the homicide of Joseph Eschack. Upon arrival at the station, Petitioner was placed in a small interrogation room where he remained for approximately 11 hours, until 5:00 a.m. the following morning (T. p. 232; App. at p. 46). During this time, Petitioner was interrogated by three Akron detectives: Cross, Goodwell, and Craig, and later by Summit County Prosecutor Zuch and Shoemaker (T. p. 222; App. at p. 44). At 6:30 p.m., approximately one hour after Petitioner was confined in this room, he gave an oral unrecorded statement implicating himself in the murder and robbery of Joseph Eschack. Prior to this confession, Petitioner testified at a suppression hearing that Detective Goodwell had told him that his friend (Manning) had implicated him and if he talked, the "court would be easy with you." (T. pp. 258, 260; App. at pp. 43, 49.) One of the other officers present (Detective Cross) didn't deny this statement that had been made by his fellow officer Goodwell. (T. p. 250; App. at p. 47.) Petitioner also testified that he had been denied the use of a telephone during interrogation. Petitioner was then shown a so-

called Miranda card and asked to read it. One of the detectives read verbatim from the card to Petitioner, and Petitioner said that yes, he understood. The officer assumed that Petitioner was able to read the card and understand his rights (T. p. 226; App. at p. 45). At the suppression hearing Petitioner told the trial court he could not read the card nor understand his rights prior to confessing. (T. p. 263, App. at p. 50.)

After this confession, Assistant County Prosecutor Shoemaker was summoned and after another reading of Miranda rights to Petitioner, he made a recorded confession at approximately 8:25 p.m. Due to difficulty in this tape recording device used, another recorded statement was made one and a half hours later at 10:40 p.m. Petitioner moved to suppress these out-of-court statements from introduction at trial based upon the failure of the police to comply with this court's ruling in Miranda v. Arizona, 384 U.S. 436 (1966) and that the confession was involuntarily made and based upon coercion. Immediately prior to trial on January 17, 1975, the court overruled the motion to suppress.

In Miranda v. Arizona, *supra*, this court recognized that the custodial "interrogation environment" in which petitioner was held incommunicado for 11 hours is created for no other purpose than to "subjugate" the accused "to the will of the examiner," 384 U.S. at 457. (See Justice Marshall Dissent, Michigan v. Mosley, 965.)

In order to protect the accused's rights under both the Sixth and Fifth Amendments, this court developed procedural safeguards to counteract the coercive pressures of the interrogations process, the so-called Miranda warning "to serve to make the individual more acutely aware that he is faced with a phase of the adversary system," 434 U.S. 469. This court held further, that the giving of the warnings is not a "preliminary ritual to existing methods of interrogation," but that under the Fifth Amendment, prior to answering the interrogator's questions, the defendant must make a knowing, voluntary, and intelligent waiver of his constitutional rights, 384 U.S. at 476. Petitioner contends that while he was given his recited Miranda warning, he did not make a knowing, intelligent, and voluntary waiver of his rights.

A.

Petitioner would ask this Honorable Court to review the case to reassert the teachings of Miranda which require not only the warning itself but a waiver of the rights delineated in the warning, by the accused. Miranda, supra, 384 U.S. at 476. The purpose of Miranda warnings are as prophylactic means of ensuring the safeguards provided in the Fifth Amendment. See Doyle v. Ohio, 426 U.S. 610, 617 (1976); Michigan v. Tucker, 417 U.S. 433, 443, 444 (1974). Where the accused is unrepresented by counsel, as the Petitioner was at the time of his custodial interrogation it is clear that the state bears a "heavy burden" in demonstrating a knowing and intelligent waiver on the part of the accused of his privilege against self-incrimination, Miranda, supra, 384 U.S. at 475. The standard to be applied to determine whether a waiver has taken place is equally clear under this court's decisions to be "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Schneckloth v. Bustamonte, 412 U.S. 218, 240 (1973).

The Ohio Supreme Court in Petitioner's case disregarded the concept of "waiver" embodied in the Miranda decision finding that police had complied with Miranda by reading the warnings to Petitioner and having an affirmative response from him that he understood, 47 Ohio St. 2d 31, 39 (App. at p. 5). The Ohio Supreme Court, just as the police officers who interrogated Petitioner "assumed" he understood his rights (T. p. 226) despite substantial evidence to the contrary.²⁵ The Supreme Court of Ohio

²⁵ At his trial the following evidence was testified to concerning his mental capacities:

Petitioner has an IQ of 76 and is classified borderline mentally retarded (T. p. 635, App. infra at p. 106). Petitioner did graduate from high school but as an "educable mentally retarded" and was 187 out of a class of 188 (T. p. 658, App. infra at p. 116). Shortly before graduation Petitioner was considered functionally illiterate by his teachers (T. p. 659; App. infra at p. 117). In the opinion of one of Petitioner's special education teachers, he was incapable of understanding words such as "waive your rights," (T. p. 627, App. infra at p. 101).

has made the Miranda warnings merely the preliminary ritual which this Court initially warned against in the Miranda, supra decision.

B.

Petitioner would also request this court to review his case based upon the admission of his confession in violation of his rights under the due process clause of the Fourteenth Amendment. In determining the standard by which confessions must pass constitutional muster, this Honorable Court has consistently held:

". . . The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." Culombe v. Connecticut, supra, 367 U.S., at 602, 81 S. Ct., at 1879."

"In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., Haley v. Ohio, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224; his lack of education, e.g., Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975; or his low intelligence, e.g., Fikes v. Alabama, 352 U.S. 191, 77 S. Ct. 281, 1 L. Ed. 2d 246; the lack of any advice to the accused of his constitutional rights, e.g., Davis v. North Carolina, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895; . . . Schneckloth v. Bustamonte, 412 U.S. 223 at 266, 227, (1973).

The Petitioner's low intelligence, lack of education, the fact that the detectives assumed he understood his Miranda rights without explaining them to him, and that he was denied access to a telephone during his 11 hours of interrogation belie the contention that his confession was "essentially a free and unconstrained choice." This Court has recently reemphasized that

besides any constitutional questions concerning Miranda violations, the issue still remains concerning the voluntariness of confession, Beckwith v. United States, ___ U.S. ___, 96 S. Ct. 1612 (1976). In Beckwith, supra, this Court held concerning voluntariness of a confession:

" . . . When such a claim is raised, it is the duty of an appellate court, including this Court, "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Davis v. North Carolina, 384 U.S. 737, 741-742, 86 S. Ct. 1761, 1764, 16 L. Ed. 2d 895, 898 (1966). Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive. Frazier v. Cupp, 394 U.S. 731, 739, 89 S. Ct. 1420, 1424, 22 L. Ed. 2d 684, 693 (1969); Davis v. North Carolina, supra, 384 U.S., at 740-741, 86 S. Ct., at 1763-64, 16 L. Ed. 2d, at 897-98 (1966). Id. at 96 S. Ct. 1617."

Petitioner will admit that this promise of leniency alone will not render his confession involuntary, see Frazier v. Cupp, 394 U.S. 731 (1969), however, this false promise of leniency by the detective prior to giving of Miranda warning cannot be viewed in a vacuum but must be viewed in totality of circumstances. Schneckloth v. Bustamonte, supra. This court observed in Miranda, supra, that isolation of the accused as petitioner during custodial interrogation is to undermine the accused's will to resist and that:

" . . . [W]hen normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights." Miranda v. Arizona, 384 U.S. at 455, 86 S. Ct. at 1617. See also State v. Watson, 457 F. 2d 197 (N.M. 1971)."

This Court has held further that the due process considerations excluding involuntary confessions rests not on the truthfulness of the confession, but on the improper methods used by the police in obtaining that

confession. Rogers v. Richmond, 365 U.S. 534 (1961). Petitioner submits, based on his acute susceptibility to the police tactics employed in his case, that his confession was involuntary, coerced, and not a product of his free will.

C.

Alternatively, Petitioner would ask this Honorable Court to grant certiorari of his case to reaffirm the principle recognized by this Court and others that individuals of limited mental and educational ability, as Petitioner, may be incapable of knowingly and intelligently waiving constitutional rights even though they were previously warned of those rights by police. Cooper v. Griffin, 455 Fed. 1142 (5th Cir. 1972); Sims v. Georgia, 389 U.S. 404 (1967); United States ex rel. Lynch v. Fay, 184 F. Supp. 277 (S.D. W.N.Y.); United States ex rel. Simon v. Maroney, 228 F. Supp. (W.D. Pa. 1964). Although Petitioner is an adult by chronological age, based upon his mental and educational deficiencies, he is the same as a juvenile. This Court has ruled that youth, low intelligence, and lack of education are salient factors in determining whether there is a waiver of constitutional rights. This Court has held that such a person is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interests or how to get the benefits of his constitutional rights. Gallergos v. Colorado, 370 U.S. at 54, Reh. Den. 370 U.S. 965 (1962); Haley v. Ohio, 356 U.S. 560 (1948); Fikes v. Alabama, 352 U.S. 195 (1957).

In applying the teachings of this Court in Miranda, supra, to persons of decidedly limited mental ability, as Petitioner, courts have held that the state has failed to meet its heavy burden of proving a knowing and intelligent waiver by the accused simply by demonstrating that the Miranda warnings were given without further inquiry as to whether they were understood. See Garret v. State, 351 N.E. 2d 30 (Ind. 1976); Commonwealth v. Jones, 328 A. 2d 828 (Penn. 1974); United States v. Blocker, 354 F. Supp.

1195, 1200-1202 (D.D.C. 1973); Commonwealth v. Daniels, 321 N.E. 2d 822 (Mass. 1975). Thus, Petitioner maintains that the state has not met its burden in his case by statements of the detectives that they "assumed" Petitioner could read the Miranda warning card and understand his rights after they recited them to him in light of other testimony that Petitioner was unable to comprehend those rights without further explanation. See Commonwealth v. Daniels, supra.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT DENIED PETITIONER HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY ALLOWING PREJUDICIAL HEARSAY STATEMENTS AT PETITIONER'S TRIAL AND THEN PRECLUDING DEFENSE COUNSEL FROM COMMENTING TO THE JURY UPON THE FAILURE OF THE HEARSAY DECLARANT TO TESTIFY AT TRIAL.

During the course of Petitioner's trial the state called Detective Russell Cross who was present during the time of Petitioner's purported confession. Detective Cross' testimony laid the foundation for the introduction of the first of three recorded statements where Petitioner implicated himself in the murder of Mr. Eshack. Over the timely objection of defense counsel, the Court allowed the playing of Petitioner's recorded statement to the jury (T. p. 343; App. at p. 64). After the playing of the recording the state was allowed to elicit hearsay testimony from Detective Cross concerning the out-of-court statements of one individual who did not testify at trial, Haywood Manning (T. pp. 428-432; App. infra at pp. 66-67). The statement of the out-of-court declarant, Haywood Manning, was that Petitioner confessed to him immediately after he had robbed and shot the victim, Joseph Eshack. Manning's hearsay statement also linked Petitioner with the murder weapon. Detective Cross testified further that his investigation singled out the Petitioner as the murderer based upon his (Cross') conversations

with Butch DeBruce, who allegedly loaned Petitioner the murder weapon.

Neither DeBruce nor Harris testified at trial.

After the defense rested at trial, the Respondent made a motion pursuant to Ohio Criminal Rule 16(B)(4)²⁶ to preclude Petitioner from commenting to the jury on Respondent's failure to call any witness whose name appeared on the witness list the state had given to Petitioner's counsel. Based on this section of Ohio Criminal Rules, the trial judge granted the motion and precluded Petitioner from commenting to the jury on Manning's and DeBruce's failure to appear at trial (T. p. 497; App. at p. 79).

Upon review, the Supreme Court of Ohio recognized that the trial judge was wrong in allowing the introduction of the hearsay statement of Manning, holding:

"Throughout the testimony of detective Cross, the state introduced hearsay testimony of Hay wood Manning and Butch DeBruce. The state brought the names of these people to the attention of the jury. The court, however, refused to allow defense counsel to mention the name Manning in final argument. In so doing, the appellant argues, the lower court erred."

"Aside from Edward's confession and the statements attributed to DeBruce, Manning's testimony and credibility were relevant in connecting Edwards with the murder weapon."

49 Ohio St. 2d 43, 44 (App. *infra* at 7, 8.)

The Supreme Court held further, however, that since the procedural rule was clear and applicable to Petitioner's case, the trial court was correct in precluding defense counsel from raising doubt to the jury concerning the uncalled witnesses (49 Ohio St. 2d at 44; App. at p. 5).

Petitioner admits to the interpretation of Ohio Criminal Rule 16(B)(4) as decided by the Supreme Court of Ohio, but he respectfully

26 Ohio Criminal Rule 16(B)(4) provides:

"The fact that a witness' name is on a list furnished under subsection (B)(1)(b) and (f), and that such witness is not called shall not be commented on at trial."

contends that in his case, where testimony of uncalled witnesses is allowed through hearsay testimony, to refuse defense counsel an opportunity to comment in closing argument is violative of Petitioner's Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process of law. Only last term this Honorable Court recognized that part and parcel of effective assistance of counsel is the right to make a closing summation to the trier of fact. Herring v. New York, 422 U.S. 853 (1976). Petitioner submits that to allow testimony of out-of-court declarants to be introduced at trial and then to prevent comment on such testimony in closing argument is to deny the ability of his counsel to make an effective closing argument. This prevents the defense from exercising the constitutional right to participate fully and fairly in the fact-finding process. See Herring, supra, 422 U.S. 853, 862.

Alternatively, this Court has long held that state procedural rules cannot be upheld where they act under the facts of the case to deny the accused a fair trial in violation of the due process clause of the Fourteenth Amendment, Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1973). In Chambers v. Mississippi, supra, this Court stated that the right of a defendant in a criminal case to confront and examine the witnesses against him is an essential part of due process. Petitioner submits that to admit key testimony of out-of-court declarants at his trial, and then to prevent his counsel from questioning the source of this testimony in his jury summation is to violate Petitioner's right of confrontation and his right to a fair trial under the due process clause of the Fourteenth Amendment.

V.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S INSTRUCTIONS THAT IF THE JURY FOUND CERTAIN FACTS TO BE TRUE THEN "A PRESUMPTION TO KILL MUST BE INFERRED" VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The due process clause of the Fourteenth Amendment and the right to a jury trial guaranteed by the Sixth Amendment coalesce to require the state to prove to the satisfaction of a jury each and every element of the offense beyond a reasonable doubt. Duncan v. Louisiana, 391 U.S. 145 (1968); Mullaney v. Wilbur, 421 U.S. 684 (1975). Because conviction for aggravated murder under Ohio Revised Code Section 2903.01 requires that the action of the accused be committed "purposely," the determination of the "intent of the accused is an ingredient to the crime charged" and "its existence is a question of fact which must be submitted to the jury." Morissette v. United States, 342 U.S. 246, 274 (1952). While such intent may be inferred, the constitution requires that such inference be permissive and not conclusive. United States v. Gainey, 380 U.S. 63, 70 (1965).

"In fact, not even a undisputed fact, may be determined by the judge. The plea of not guilty puts all in the issue, even the most patent truth: In our federal system, the trial court may never instruct a verdict in whole or in part."²⁷

United States v. Musgrave, 444 F. 2d 755, 762 (5th Circuit 1971).

For this reason "it follows that the trial court may not withdraw or prejudge the issue by [any] instruction that the law raises a presumption of intent from an act." Morissette, supra.

In the case at bar, the trial court violated these standards by instructing the jury as follows:

"If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the presumption to kill must be inferred from the use of said weapon," (T. p. 557.)
(Emphasis added.)

²⁷ The trial court's instructions at the case at bar, by effectively reducing the jury's determination on the issue of intent made what was in fact a partially directed verdict.

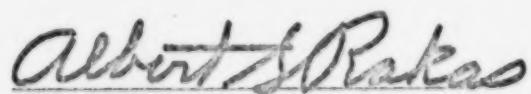
By virtue of this instruction the trial court created a conclusive presumption moving from the state its burden of proof upon the issue, intent, and denying the jury the right to reach a finding of fact upon that issue.

Consequently, the court's instructions denied Petitioner his Sixth Amendment right to have the facts determined by the jury and due process right to require the state to prove each and every element of the offense beyond a reasonable doubt. Because of the importance of these constitutional rights, and because of the failure of the Ohio courts to adequately consider these substantial issues, the Defendant has no choice but to petition this Court for the review of the meaning of these constitutional provisions.

CONCLUSION

Last term, this Court reviewed the capital-sentencing systems in five states under the scrutiny of the Eighth and Fourteenth Amendments. This Court held that the determination of whether a particular state has retained the death penalty consistent with the Constitution is made on a state-by-state basis. See Gregg, supra, at 428 U.S. 195. Based upon the questions presented in regard to the constitutionality of Ohio's death penalty statute, as well as the other constitutional questions set forth, Petitioner would pray that his petition for a writ of certiorari be granted.

Respectfully submitted,


Albert S. Rakas

Richard L. Aynes

Robert J. Croyle

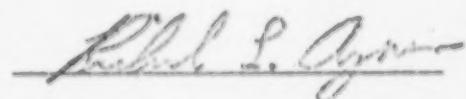
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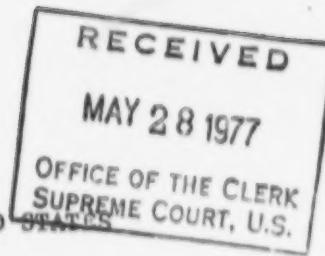
CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Petition for a Writ of Certiorari and the Appendix thereto to Counsel for the Respondent, Mr. Stephen M. Gabalac, Summit County Prosecutor, City-County Safety Building, Akron, Ohio 44308 on this 27th day of May, 1977.



Richard L. Gwin
Attorney for Petitioner





IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6837

FLOYD EDWARDS, Petitioner

-vs-

STATE OF OHIO, Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO
OHIO SUPREME COURT

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Statement of the Case.

THE STATE OF OHIO, APPELLEE, v. EDWARDS, APPELLANT.

[Cite as State v. Edwards (1976), 49 Ohio St. 2d 31.]

Criminal law—Aggravated murder—Evidence—Corpus delicti—Proved, how—Confession—Voluntary, when—Admissibility—Imposition of death penalty.

- 1a. The *corpus delicti* of a crime is the body or substance of the crime, included in which are usually two elements: (1) the act and (2) the criminal agency of the act.
- b. There must be some evidence in addition to a confession tending to establish the *corpus delicti*, before such confession is admissible.
- c. The *quantum* or weight of such additional or extraneous evidence is not of itself required to be equal to proof beyond a reasonable doubt, nor even enough to make a *prima facie* case. See *State v. Maranda*, 94 Ohio St. 364.
2. In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.

(No. 76-38—Decided December 29, 1976.)

APPEAL from the Court of Appeals for Summit County.

On December 28, 1974, Joseph Eshack, Jr., was shot and killed at his place of business located at 223 Wooster Avenue, Akron. He was found by the Akron police lying with his face down in the aisle of his storeroom. His business consisted of the sale and rental of used tools.

Prior to the police discovering Eshack, Floyd Edwards met with a friend named Standford Harris. Edwards told Harris that he was going to rob Joseph Eshack. Edwards asked Harris to participate and showed him a gun. Harris consented. Edwards and Harris entered the store

(1)

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Statement of the Case.

and soon thereafter argued with Eshack over the price of various tools scattered over the floor. The last item discussed was a pair of wire cutters, and, as Eshack bent over to pick them up, Edwards pulled the gun from his pocket and demanded Eshack's money. Edwards grabbed Eshack's arm and a struggle ensued. Edwards fired a bullet into the back of Eshack's head. The shot was fatal.

After the shot was fired, Eshack's wallet was taken. It contained some credit cards, identification papers, other miscellaneous papers, and \$65. The money was divided between Edwards and Harris. The wallet was later discarded in the basement of a nearby apartment house. Gary Hendon, a maintenance man at the Edgewood Home Apartments, found Eshack's wallet in the basement of one of the apartment buildings. Hendon knew Edwards, and remembered seeing him in that basement two or three days before finding the wallet.

At about 5:30 p. m., on January 9, 1975, Edwards was arrested by two detectives of the Akron police, Harold Craig and Grover Goodwell. Following the arrest, Edwards was taken to the police station to be interrogated. After receiving his *Miranda* warnings from detective sergeant Russell Cross, defendant made an oral, unrecorded incriminating statement. Also present in the room at the time of that statement were Craig and Goodwell.

At 8:20 p. m., later that day, Edwards, after receiving another explanation of his constitutional rights, gave a tape-recorded statement of his confession in the presence of assistant county prosecutor John Shoemaker, Cross and Goodwell. When the prosecutor flipped the cassette to side two, it did not properly engage. Approximately 75 feet of the tape was blank.

At 10:25 p. m., another recorded statement was taken to fill in the blank 75 feet. Shoemaker again read Edwards his *Miranda* warnings. Edwards repeated his confession. Also present in the room were Craig, and one Haywood Manning.

Sometime during the interrogation of Edwards the

Opinion, per O'NEILL, C. J.

location of the gun was ascertained. A search warrant was drawn and a search of 1125 Inman Court was made. During that search, a .32 caliber automatic pistol was found. Edwards admitted that the gun was the one he used to shoot Eshack. This statement was recorded at 2:45 a. m. on January 10, 1975, after Edwards had again been advised of his constitutional rights by Shoemaker. The gun was eventually physically linked to the crime through a ballistics test.

Defendant was subsequently indicted by the Summit County Grand Jury for aggravated murder with two specifications, R. C. 2929.04(A)(3) and 2929.04(A)(7), and for aggravated robbery. The defendant was arraigned on January 17, 1975, and plead not guilty. At the arraignment, the court ordered a psychiatric examination of the defendant and set the date of the trial for March 4, 1975. Elliot Migdal, M. D., a psychiatrist, and Daniel Rienhold, a psychologist, examined defendant prior to trial. The jury found the defendant guilty of aggravated murder, guilty of the second specification and guilty of aggravated robbery. Following a mitigation hearing, defendant was sentenced to death on the aggravated-murder charge, and was also sentenced on the aggravated-robbery charge.

(2)

Upon appeal to the Court of Appeals, the judgment of the trial court was affirmed, and the cause is now before this court as a matter of right.

Mr. Stephan M. Gabalac, prosecuting attorney, and *Mr. Carl M. Layman, III*, for appellee.

Messrs. Chuparkoff, Lombardi & Reed and *Mr. Ted Chuparkoff*, for appellant.

O'NEILL, C. J. Appellant presents 12 assignments of error (hereinafter referred to as "propositions of law").

I.

In his fourth proposition of law, appellant contends that the trial court erred in finding that the state had presented sufficient evidence to show the commission of an

Opinion, per O'NEILL, C. J.

aggravated robbery prior to the admission of the appellant's confession to that offense.

The relevant rule of law is found in *State v. Maranda* (1916), 94 Ohio St. 364, 114 N. E. 1038, as follows:

"1. By the *corpus delicti* of a crime is meant the body or substance of the crime, included in which are usually two elements: 1. The act. 2. The criminal agency of the act.

"2. It has long been established as a general rule in Ohio that there must be some evidence outside of a confession tending to establish the *corpus delicti*, before such confession is admissible. The *quantum* or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a *prima facie* case. * * * *

Under count two of the indictment, the material elements of aggravated robbery relevant herein include the following: (1) without the owner's consent, to obtain or exert control over the owner's property, (2) a purpose to deprive the owner of his property, and (3) the defendant in the commission of the act or in fleeing immediately thereafter, either to have on or about his person or under his control a deadly weapon or dangerous ordnance as defined in R. C. 2923.11, or to inflict serious physical harm on another.

The defendant contends that "there is absolutely no evidence offered by the state that anything of value was ever taken from the decedent." If not, the argument continues, excluding Edward's confessions, "there was no evidence from which it can be said by clear and unequivocal proof that decedent was killed in the course of a robbery." The defendant concludes that there was insufficient evidence to prove that an aggravated robbery was committed, for the following reasons: (1) the fact that the defendant was found without a wallet, when no evidence was presented that he even carried a wallet, cannot be said to be circumstantial evidence he was robbed, especially when it was discovered that the decedent did have money on his per-

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son; (2) the fact that a wallet was later found containing the decedent's identification cards does not show the wallet was owned by the decedent, and (3) the evidence was not clear whether defendant was seen in the vicinity of the wallet before or after the decedent was found.

In rebuttal, the state emphasizes paragraph two of the syllabus in *Maranda, supra*. In order to make Edwards' confession admissible, the state need only produce *some* evidence of the material elements listed above. "The *quantum* or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a *prima facie* case." *Maranda, supra*.

In the instant case, a few days following decedent's death a wallet was found in the basement of an apartment complex. The billfold contained some credit cards, identification papers and miscellaneous papers of the decedent, but no money. Considering those facts, the state concludes that sufficient evidence existed to establish the *corpus delicti* of aggravated robbery.

The necessity of independently proving the *corpus delicti* to render admissible an extrajudicial confession is a well-established rule of evidence. Its origin is explained by Judge Wanamaker in *State v. Maranda, supra*, at page 370, as follows:

"This doctrine touching *corpus delicti* is of ancient origin and was born out of great caution by the courts, in consideration of certain cases of homicide wherein it had turned out that by reason of a failure of the government to prove the death of the person charged as having been murdered it so happened that such person sometimes survived the person accused as his murderer. Therefore, the rule that there must be some evidence tending to prove the fact that death had actually ensued; which was later followed by an additional requirement of some evidence that that death was brought about by some criminal agency."

Considering the revolution in criminal law of the

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1960's and the vast number of procedural safeguards protecting the due-process rights of criminal defendants, the *corpus delicti* rule is supported by few practical or social-policy considerations. This court sees little reason to apply the rule with a dogmatic vengeance.

In considering the minimal requirements of *Maranda* and in evaluating the evidence in light of the ordinary customs of our times, we conclude that the prosecution did produce *some* evidence tending to corroborate the material elements of aggravated robbery.

This proposition of law is not well taken.

II.

Taking the remaining propositions of law in their numerical sequence, we find in proposition of law No. 1 the claim that the trial court erred in "allow[ing] the prosecutor to receive a copy of a psychiatric examination prior to the trial and conviction of the defendant."

After the defendant entered a not guilty plea, the trial court ordered a psychiatric evaluation of the defendant. During the examination, the defendant made several incriminating statements relating to his participation in the robbery and murder. A copy of this report was then given to the prosecutor.

Although the record is not clear, the trial court apparently ordered the examination to determine whether the defendant was competent to stand trial. Under R. C. 2945.37, such an order was proper. However, the court erred, the defendant alleges, in allowing the prosecution to receive a copy of the report before the defendant was tried and convicted. The defendant claims the error to have been prejudicial. At trial, testimony was offered by the state from detective Cross that Edwards slept in a basement of Edgewood Home Apartments. The testimony, the defendant claims, was critically important in proving that Edwards was known to sleep where the wallet was found. Defendant further insists that detective Cross obtained this information from the psychiatric report. Without such testimony, the defendant continues, there would have been

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insufficient evidence to render the defendant's confession admissible. And without the confession, he concludes, there was insufficient evidence to support the jury's verdict.

The state, in rebuttal, argues that the psychiatric report contained no evidence that had not already been uncovered by the police. The officers were aware of Gary Hendon, the custodian who found the billfold. The report, moreover, was never referred to in the presence of the jury or introduced in evidence.

The issue is whether the disclosure of the psychiatric report to the prosecutor, prior to trial, violated the defendant's right against self-incrimination. Although this claim presents significant constitutional questions, it need not be addressed by this court. In light of the facts of the case, defendant's argument is significant only if one assumes that without Cross' testimony, the defendant's confession would be inadmissible. Having arrived at the contrary conclusion in the analysis of the appellant's fourth proposition of law, the court need not resolve this argument.

This proposition of law is rejected.

III.

In his second proposition of law, appellant complains that "[t]he mere reading of the *Miranda* rights to the accused who purports to understand them and then purportedly waives his right to remain silent is not in compliance with the law."

On January 9, 1975, the defendant was arrested at 5:30 p. m. From approximately that time to 3:00 a. m. on January 10, 1975, the defendant was kept in interrogation room No. 9. During that period he was interrogated four times; three of the four interrogations were tape-recorded. The appellant challenges the admissibility of the confessions obtained during these interrogation periods. Since the original statement given to the police established his participation in the crime, only the circumstances of this confession are legally significant. If the confession was voluntarily made, then the legality of the later statements, obtained at 8:20 p. m. and 10:25 p. m., respectively, is not

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important. If the subsequent confessions were legally obtained, then their admission relates to events already proven. If the subsequent confessions were illegally acquired, in light of the lawfulness of the original statement given to the police shortly after the appellant's arrest, then their admission constitutes harmless error. *Harrington v. California* (1969), 395 U. S. 250; *Chapman v. California* (1967), 386 U. S. 18.

Having been in custody for about an hour following his arrest, on January 9, 1975, the defendant was interrogated by detective Cross. Before questioning the defendant, Cross read to the defendant his *Miranda* warnings. After having read each right aloud, Cross asked the defendant if he understood. The defendant said "yes." After reading the *Miranda* warnings, Cross told the defendant that he could stop talking to either himself (Cross) or detective Goodwell any time he wished. At approximately 6:30 p. m., the defendant gave an oral, unrecorded confession.

In *Miranda v. Arizona* (1966), 384 U. S. 436, the Supreme Court held that the prosecution has the burden of proving the following facts in order for a statement made by an accused at the time of custodial interrogation to be admitted in evidence: (1) the accused, prior to any interrogation, was given the *Miranda* warnings; (2) at the receipt of the warnings, or thereafter, the accused made "an express statement" that he desired to waive his *Miranda* constitutional rights; (3) the accused effected a voluntary, knowing, and intelligent waiver of those rights.

There are no presumptions to aid the prosecution in its attempt to prove a valid waiver of the right to counsel and the privilege of silence. At various points in the majority opinion in *Miranda*, the court seizes upon specific factual criteria which it emphatically indicates will not support a presumption of waiver. These criteria are: (1) a waiver will not be presumed simply from the silence of the accused after the warnings are given; (2) a waiver will not be presumed simply from the fact that a confession was

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in fact eventually obtained; (3) a waiver will not be presumed if the individual answers some questions or gives some information on his own initiative prior to invoking his right to remain silent when interrogated; (4) a waiver will not be presumed if the accused fails to ask for the assistance of an attorney; and (5) a waiver will not be presumed from a silent record.

The defendant argues his confession is inadmissible for basically the following three reasons: (1) The *Miranda* warnings were inadequate in that Cross never explicitly asked the defendant whether he wanted an attorney; (2) the waiver was not intelligently made because defendant had a low IQ and could only read on a second-grade level; and (3) the waiver was not voluntarily made in that officer Goodwell "induced" the defendant to confess by telling the defendant the court would be lenient on him, if the defendant told the truth.

Miranda does not require a police officer to ask the defendant whether he wants an attorney. He need only inform the accused, as was done here, that the accused has a right to a retained or appointed attorney. Moreover, the defendant was 21 years old, a high school graduate, and able to understand the English language. In being asked whether he understood his rights, he responded affirmatively. He never asked for an attorney.

The only significant issue is whether the defendant's waiver was voluntary in light of Cross' "inducement."

Miranda specifically holds that "any evidence" showing that the accused was "cajoled" will render the waiver decision involuntary. *Miranda v. Arizona, supra* (384 U. S. 436), at page 476. "Cajolery," in this context, may be defined as the act of persuading or deceiving the accused, with false promises or information, into relinquishing his rights and responding to questions posed by law enforcement officers.

In demanding that a confession be voluntary, *Miranda* was requiring nothing new. The Supreme Court of the United States had established such to be the law in *Bram*

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STATE OF OHIO)
) ss:
SUMMIT COUNTY)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
(September Term, 1975)

STATE OF OHIO,)
Plaintiff-Appellee)
v.)
FLOYD EDWARDS)
Defendant-Appellant)

C. A. No. 7784

APPEAL FROM JUDGMENT
ENTERED IN THE COURT
OF COMMON PLEAS OF
SUMMIT COUNTY, OHIO
CASE NO. 75 1 52

DECISION AND JOURNAL ENTRY

Dated: November 26, 1975

This cause was heard October 16, 1975, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. Each assignment of error was reviewed by the court and the following disposition made:

DOYLE, J.

The defendant-appellant, Floyd Edwards, was sentenced in the Court of Common Pleas of Summit County to death in the electric chair and to a term of 7 to 25 years in the penitentiary pursuant to his conviction by a jury of the

[COPY]

crimes of aggravated murder and aggravated robbery. The instant appeal by Edwards seeks a reversal of the conviction and sentences. Errors are assigned which he claims are prejudicial to his rights and justify his demands.

Evidence in the record establishes the following facts. On December 28, 1974, Joseph Eshack, Jr., an Akron business man, was shot and killed at his place of business located at 223 Wooster Avenue, Akron, Ohio. He was found by Akron Police lying with his face down in the aisle of his store room. His business consisted of the purchase, rental and sale of used tools and appliances.

On this date, Floyd Edwards, a twenty-one year old high school graduate, met with a friend named Stanford Harris on Wooster Avenue and told him that he was going to rob Joseph Eshack. Edwards asked him to participate in that robbery and showed him a gun. Harris consented. Edwards knew Eshack and Eshack knew Edwards because of prior business dealings. Edwards and Harris entered the store and soon thereafter argued over the price of various tools scattered over the floor. The last item talked about was a pair of wire cutters and as Eshack bent over to pick them up, Edwards pulled a gun from his clothing and demanded Eshack's money. Edwards grabbed Eshack's arm and a struggle ensued.

The gun in Edward's hand was then engaged by him resulting in a bullet being fired into the rear of Eshack's head slightly above the hair line at the neck. The bullet killed the victim and he was left on the floor when sometime later his body was found by an Akron policeman.

After the shot was fired the victim's wallet was taken. It contained some identification papers and \$65. This money was divided between Edwards and Harris. The wallet was taken and later discarded in the basement of an apartment house. Edwards' presence in the apartment house after the shooting was established in the evidence.

On January 9, 1975, Edwards was arrested following a thorough investigation by the Akron Police. He told the police of his participation in the robbery and his recollection of the killing. He also told the police where they could find the gun. It was later found to be the gun which fired the bullet found by the coroner in the victim's head.

In due course, the defendant was indicted by a Summit County grand jury. In a first count it was charged that he

"did commit the crime of AGGRAVATED MURDER in that he, did purposely cause the death of Joseph Eshack, Jr., while said Defendant was committing, or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery (2911.01), said death being contrary to Ohio Revised Code 2903.01(B), and further said cause of death

being done under aggravating circumstances,
to-wit:

Specification (1) to Count (1) 2929.04(A)3

The Grand Jurors further find and specify that said offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by said Defendant, to-wit: Aggravated Robbery 2911.01.

Specification (2) to Count (1) 2929.04(A)7

The Grand Jurors further find and specify that the offense presented above, the killing of Joseph Eshack, Jr., was committed while the said Defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery, 2911.01. "

A second count in the indictment states:

"And the Grand Jurors of the State of Ohio, within and for the body of the County of Summit aforesaid, on their oaths in the name and by the authority of the State of Ohio, DO FURTHER FIND AND PRESENT, That FLOYD EDWARDS, at the County of Summit and State of Ohio, on or about the 28th day of December, A.D., 1974, at the County of Summit, did commit Aggravated Robbery, to-wit: that said FLOYD EDWARDS while he was attempting to commit or was committing a theft offense as defined in 2913.01 of Ohio Revised Code, to-wit: said Defendant FLOYD EDWARDS, did take and deprive Joseph Eshack, Jr., of certain United States Currency in the amount of SIXTY-FIVE DOLLARS (\$65.00); or while fleeing immediately after such attempt or offense did inflict serious physical harm to another, ie., he did kill Joseph Eshack, Jr., in the City of Akron, County of Summit and State of Ohio, with a deadly weapon, to-wit: a Pistol, said offense of Aggravated Robbery in violation of Ohio Revised Code Section 2911.01(A)(1) and/or (2), contrary to the form of the statute in such case made and

provided and against the peace and dignity of the State of Ohio."

Upon the submission of the case to the jury, the defendant Edwards, was found guilty of aggravated murder, not guilty of specification 1(supra) but guilty of specification 2 (supra). The jury also found him guilty of aggravated robbery as charged in the second count in the indictment (supra).

In this appeal seeking a reversal of the judgment entered by the trial court, there are twelve assignments of error. We have examined the voluminous record and will pass on the claimed errors in the light of the record before us.

Assignment of Error No. 1

"The court erred in allowing the prosecutor to receive a copy of Dr. Elliot Migdal's psychiatric examination prior to the trial and conviction of the defendant."

After the arraignment of the accused, where a plea of not guilty was made, the court ordered a psychiatric evaluation of the defendant. Dr. Elliot Migdal was selected by the court and he thereupon examined the accused. In the process of the examination, the subject made a number of statements relating to his participation in the robbery and murder. A report of the examination was made by the doctor to the court. The defense counsel objected to the entire

procedure and specifically asked that the report not be made available to the prosecution.

It appears from the court's letter to the doctor that he based the authority for such an examination before trial on R.C. 2929.03(D) and R.C. 2947.06. If these code sections were the court's authority for the examination, the court was in error. At any rate, the doctor's findings were not offered in the trial and were not before the jury. Furthermore, the accused's statements to the doctor were not at variance with similar statements made to the police by the defendant.

While we hold this procedure of the trial court erroneous, as no claim had been made that the defendant lacked mental capacity to stand trial, we are of the opinion that it falls within the rules of Ohio Criminal Procedure, stated in Rule 52(A) as follows:

"Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

Compare, Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705 (1967). We find from the record that the substantial rights of the defendant were not affected.

Assignment of Error No. 2

"The court erred in not suppressing statements made by the defendant to the Akron Police."

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v. *United States* (1897), 168 U. S. 532, 542, as follows: "••• [A] confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by *any direct or implied promises, however slight*, nor by exertion of any improper influence •••"

Although the language of *Bram* is categorical, it is doubtful whether the courts today would interpret the *Miranda* requirements so that any promise, "however slight" which induces a confession would render the confession involuntary and hence inadmissible. Thus in *United States v. Ferrara* (C. A. 2, 1967), 377 F. 2d 16, 17, certiorari denied, 389 U. S. 908, the Court of Appeals stated:

"••• The *Bram* opinion cites with approval the statement in an English textbook that a confession is not voluntary if 'obtained by any direct or implied promises, however slight.' That language has never been applied with the wooden literalness urged upon us by appellant. The Supreme Court has consistently made clear that the test of voluntariness is whether an examination of all the circumstances discloses that the conduct of 'law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined' •••"

"The 'wooden' application of *Bram* was also rejected in *United States v. Frazier*, 434 F. 2d 994 (5th Cir. 1970). In *Frazier*, an F. B. I. agent told defendant 'that if he cooperated with them his cooperation would be made known to the United States Attorney, that there might be some consideration given by the United States Attorney but that the agents could make no promises.' The court held such a promise, standing alone, insufficient to render the confession involuntary." *United States v. Arcediano* (1974), 371 F. Supp. 457, 469.

In deciding whether the defendant's confession in this case was involuntarily induced, the court should consider the *totality* of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length,

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intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. *Brown v. United States* (C. A. 10, 1966), 356 F. 2d 230, 232. Under the "totality of circumstances" standard, the presence of promises does not, as a matter of law, render a confession involuntary. In *United States v. Stegmaier* (1975), 397 F. Supp. 611, an F. B. I. agent's promise that the defendant's "cooperation" would be considered in the disposition of the defendant's case did not render the subsequent confession involuntary. In *United States v. Barfield* (1975), 507 F. 2d 53, the court held that the fact that a 16-year-old defendant was told by an F. B. I. agent that it would be in "his best interest" to tell the "real story," and that telling a lie might result in his being left "holding the bag," did not foreclose, as a matter of law, the voluntariness of the confession. In *United States v. White* (C. A. 5, 1974), 493 F. 2d 3, the court held that in an otherwise noncoercive atmosphere, an isolated statement made to an accused that his confession would be "helpful," did not, standing alone, invalidate an otherwise legal confession.

The trial court did not find officer Goodwell's statement to be of such a nature as to render involuntary the appellant's confession. We believe this to be correct. To promise that the court will be "lenient" if one tells the truth is not unlike an admonition that it would be in one's "best interest" to tell the truth and not get caught "holding the bag." *Barfield, supra*. The accused in the instant case had been given his rights and was of majority age. The defendant, at the time of his first confession, had been in custody for approximately one hour. The atmosphere was non-coercive and the questioning had not been continuous. There was no physical deprivation or mistreatment. The record supports the finding that the defendant voluntarily waived his constitutional rights.

IV.

Proposition of law No. 3 reads: "Criminal Rule 16(B) [1](e) is a mandatory rule which requires strict compli-

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ance. Rule 16(E)(3) applies only to the introduction of physical evidence. The trial court abuses its discretion if it permits a witness to testify whose name was not on the witness list by mere neglect." Appellant complains that the trial court erred in permitting a state's witness to testify when the state, in violation of an earlier court order, failed to furnish the name and address of the witness prior to trial.

Crim. R. 16(E)(3) provides for the regulation of discovery, and it permits the trial court to exercise its discretion in selecting the proper and just procedure to be followed when a party fails to comply with a discovery order. Crim. R. 16(B)(1)(e) provides for the furnishing of the names and addresses of all witnesses the prosecution intends to call at trial. In the instant case, the prosecution called officer Ronald Davis whose name did not appear on the list of names furnished by the prosecution to the defendant pursuant to a motion filed by the defendant requesting the names and addresses of all witnesses. Over objection by the defendant, the court permitted Davis to testify as to the position in which he found the decedent and the location of a shell casing, and to identify state's exhibits numbered 4 through 10. The issue is whether the trial court abused its discretion in admitting the testimony.

Because trial courts are given much latitude in supervising pretrial discovery, we conclude that the lower court did not abuse its discretion in allowing Davis to testify. From the record, it appears the prosecutor's mistake was inadvertent. Moreover, there is little reason to believe the appellant was ill-prepared and surprised by Davis' testimony. Although the witness list was incomplete, it did include the name of Mack Newberry, the partner of Ronald Davis, who accompanied him on his tour of duty. It was the intention of the state to call Newberry as its first witness, but a heart attack the night before trial precluded his appearance, and Davis was called in his stead. Moreover, much of Davis' testimony was identical to that of the coroner's investigator, Charles Elliot. Furthermore,

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although the trial court overruled defense counsel's objection to Davis' testimony in its entirety, defense counsel could have, but did not, move for a continuance in order to have sufficient time in which to prepare for cross-examination. In the absence of such a motion, the trial court properly concluded that defense counsel was prepared to go forward at that time. The trial court had, pursuant to Crim. R. 16(E)(3), the discretionary power to make such a determination.

This proposition of law is not well taken.

V.

In his fifth proposition of law, appellant suggests that the trial court erred in permitting in evidence the tape recording of the defendant's confession with reference to the killing of the decedent. Appellant asserts that "[t]he total recorded confession by the defendant was a confession of aggravated robbery and aggravated murder and that the statement of both offenses could not be separated." As advanced by the appellant's fourth proposition of law, the statement with reference to the robbery should not have been permitted for the reason that the state failed to prove any facts, other than by the defendant's confession, that a robbery was committed. Hence, since the two statements could not be separated, both should be prohibited from being introduced in evidence.

In appraising this proposition, this court is of the opinion that the tape-recorded confessions were admissible in evidence for the reasons advanced in our ruling on proposition of law No. 4.

VI.

The next proposition of law advanced by appellant, No. 6, proposes that the Criminal Rules do not preclude the defendant's counsel, in final argument, from commenting to the jury that the state failed to call certain witnesses, when the state was responsible for bringing their names to the attention of the jury, after the court allowed the state to introduce hearsay testimony over objection.

Throughout the testimony of detective Cross, the state

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introduced hearsay testimony of Haywood Manning and Butch DeBruce. The state brought the names of these people to the attention of the jury. The court, however, refused to allow defense counsel to mention the name Manning in final argument. In so doing, the appellant argues, the lower court erred.

Aside from Edward's confession and the statements attributed to DeBruce, Manning's testimony and credibility were relevant in connecting Edwards with the murder weapon. Since Manning was never called to the stand, the defendant argues that he should have been able to mention such fact to the jury. Relying on Crim. R. 16(B)(4), the court made a limited ruling. It held that the defense could give any number of arguments, but could not impeach Manning's statements by mentioning the prosecutor's failure to call him as a witness.

Crim. R. 16(B)(4) provides:

"The fact that a witness' name is on a list furnished under subsection (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at trial."

Considering the purpose of the rule and the availability of Manning as a witness throughout the trial, we believe the trial court was correct in ruling that the defense could not argue before the jury, "[W]here is Mr. Manning?" A party is not required to use every prospective witness it may have. Once the prosecution has established its case, it may rest at the point it chooses. The rule effectively precludes the defense raising doubt or innuendo about an uncalled witness, and what he might say. The record shows, incidentally, that Manning was interviewed by defense counsel in the discovery stages of the trial.¹⁸

VII.

Proposition of law No. 7 reads: "Ohio Revised Code 2911.01 is unconstitutional for the reason that it is ambiguous, vague and does not specifically recite an offense."

The lower court properly held that R. C. 2911.01, when read in light of R. C. 2913.02, is not ambiguous or vague.

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VIII.

In proposition of law No. 8, applicant pleads error as follows:

"It is prejudicial error to instruct the jury that the purpose to kill *must* be inferred from the use of a deadly weapon."

While instructing the jury about the law, the trial court said the following:

"It must be established in this case that at the time in question there was present in the mind of the defendant a specific intent to kill Joseph Eshack, Jr.

"Now, purpose is the decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

"The purpose with which a person does an act is known only to himself unless he expresses it to another or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means and method and the weapon used, and all other facts and circumstances in evidence.

"If a wound is inflicted upon a person with a deadly weapon *in a manner calculated to destroy life*, the purpose to kill *must* be inferred from the use of said weapon. Both an inference of malice may be inferred from the facts and circumstances of an unlawful killing where a deadly weapon is used." (Emphasis added.)

The defendant argues that the use of a dangerous weapon is not *conclusive* proof of an intent to kill, and that the jury must be free to decide whether the actual intent was to wound or disable, or whether the killing was purely accidental.

In reading the court's instructions to the jury in their entirety, this court does not believe the above instruction to have constituted prejudicial error. Having made such a decision, the court does not need to consider the significance of the defendant's failure to object to the charge or request a correction.

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This proposition of law is without merit.

IX.

As his proposition of law No. 9, appellant contends that "[t]he Ohio statutes with reference to aggravated murder, a capital offense, and the related sections dealing with death in the electric chair are unconstitutional for the reason that the mitigating circumstances of mental deficiency has no definition in law, is vague, ambiguous, and impossible to ascertain with any degree of uniformity."

This argument has already been considered and rejected by this court in *State v. Black* (1976), 48 Ohio St. 2d 270, — N. E. 2d —.

X.

Proposition of law No. 10 reads:

"The Ohio statute with reference to aggravated murder and related sections dealing with death in the electric chair are unconstitutional for the reason that they do not assure the defendant the equal protection of the law."

This argument is without merit. *State v. Bayless*, *supra*.

XI.

As his proposition of law No. 11, appellant pleads error as follows: "It is reversible error to request a psychiatrist to make the ultimate legal conclusion as to whether the offense was primarily the product of the offender's mental deficiency."

In a letter to Dr. Elliot Migdal, contained in the record, the court instructed him that the legal definition of mental deficiency is "whether or not the offense was primarily the product of the offender's (Floyd Edwards) psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." The letter merely repeated the statutory language regarding mitigation. The psychiatrist did not decide ultimate legal issue of mitigation. He merely provided information in that regard. The trial court was not restricted by the doctor's testimony, nor was he constrained to accept it. The trial court,

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not the psychiatrist, made the determination that no mitigating circumstances existed.

This proposition of law is not well taken.

XII.

In his final proposition of law, appellant pleads error as follows:

"When the medical testimony is that the defendant, because of his mentality, could not be expected to form the same good judgment as a normal person, especially under stress, a finding that the offense was not the product of the accused's mental deficiency is manifestly against the weight of the evidence."

There is evidence indicating that the defendant was below average in intelligence. However, expert testimony indicated that he was not mentally deficient or retarded. He was a graduate of one of the local high schools. Despite this fact, there is evidence that he was educationally deficient. However, educational deficiency does not equate with mental deficiency.

In criminal appeals, this court will not retry issues of fact. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered. From the evidence before it, the trial court had more than sufficient evidence to support its judgment. *State v. Cliff* (1969), 19 Ohio St. 2d 31, 249 N. E. 2d 823.

This proposition of law is not well taken.

Accordingly, for the reasons stated, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN
and P. BROWN, JJ., concur.

Subsequent to the defendant's arrest, he was questioned by the various officers on duty. His replies and statements establish beyond any doubt that he carried out his planned robbery and in the process thereof intentionally shot his helpless victim. At all times he was advised of his constitutional rights and was repeatedly given the so-called Miranda warning. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). In most instances, the warnings were read by the interrogators from a memorandum card carried for the express purpose of giving the proper warning. After all of the warnings were given, he was asked if, understanding his rights, he wished to talk about the robbery and homicide. His answers were "yes." He did not ask for an attorney. He said that he was a high school graduate (school records established this fact) and that he was 21 years of age.

It is urged that defendant's rights were jeopardized when he was interrogated for 9-1/2 hours. While he was in the custody of the police for that length of time, the interrogation was not continuous. The periods of interrogation were not lengthy. The first statement by the defendant of his participation in the crime was made less than one hour after the initial interrogation began. See, Miranda v. Arizona, supra, on this critical period of time.

We find no evidence in this record of physical or psychological coercion. To the contrary, the record reflects voluntary statements relating to the defendant's robbery and shooting of the victim, Eshack. These statements all come well within the Miranda tests and those of *State v. Kassow*, 28 Ohio St. 2d 141 (1971). The totality of circumstances convince this court that the confession to the crime was voluntarily made following a knowing and voluntary waiver of constitutional rights. *Fraizer v. Cupp*, 394 U.S. 731, 22 L. Ed. 2d 684 (1969); *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed 2d 854 (1973).

We find against the defendant on his second assignment of error that "the court erred in not suppressing statements made by the defendant to the Akron Police."

Assignment of Error No. 3

"The court erred in permitting police officer Ron Davis as a witness for the reason that under the Rules of Criminal Procedure the prosecution failed to furnish the name of said witness prior to trial (Rule 16-B-E)."

By inadherence, the prosecution failed to include the name of Patrolman Ron Davis on the "discovery list" made available to the defense. Included in the list, however, was the name of Mack Newberry, the partner of Ron Davis, and who accompanied him on his tour of duty. It was the intention

of writing this and a ⁽¹⁷⁾ page in

*Not
decided.*

of the State to call Newberry as its first witness, but a serious heart attack the night before the trial precluded his appearance as a witness and Davis was thereupon called in his stead.

The testimony of Ron Davis was not crucial to the case.

*of no
material value
but they will
help to establish
the truth*

Other witnesses testified to essentially the same series of facts. Under no possible theory can this testimony be said to have prejudiced the rights of the accused; and furthermore, this pictures a circumstance in the trial of criminal cases when Crim. R. 16(E)(3) may be brought into action. The rule permits the court, in the administration of justice, to exercise its discretion in the allowance or disallowance of such testimony.

In this case, we find the claimed error non prejudicial and find that the court did not abuse its discretion in allowing the officer to testify.

Assignment of Error No. 4

"The court erred in allowing into evidence the defendant's confession that he had robbed the decedent for the reason that there was no other evidence of the robbery and that as a result thereof the corpus delecti or robbery was only proven by the defendant's confession."

The law is well established that an extra-judicial confession alone cannot be used to prove the corpus delecti, in the instant case, aggravated robbery and murder. However,

it may be taken into consideration in connection with other evidence in the case, either positive or circumstantial, in making out the corpus delecti. In this case, there is only circumstantial evidence to show aggravated robbery. No wallet with money was found on the body of the victim.

However, the victim's wallet without money was found in the basement of an apartment house in a place where the accused was observed to have been shortly after the killing.

In our opinion the extensive corroborative facts, as shown by this circumstantial evidence tending to establish the corpus delecti, are sufficient to render the confession admissible and when these corroborating facts pointing to robbery are considered with the confession, the evidence we find is sufficient to establish the completion of the crime as it is charged in the indictment, i.e. aggravated murder and aggravated robbery.

Assignment of Error No. 5

"The court erred in permitting into evidence the tape recording of the defendant's confession with reference to the killing of the decedent."

The defendant asserts in urging this assignment of error that "the total confession by the defendant was a confession of aggravated robbery and aggravated murder and that the statement of both offenses could not be separated." As (19)

No circumstantial evidence of the victim's wallet

advanced by assignment of error number 4, the statement with reference to the robbery should not have been permitted for the reason that the State failed to prove any facts, other than by the defendant's confession, that a robbery was committed. Hence, since the two statements could not be separated, both should be prohibited from being introduced into evidence."

In appraising this assignment of error, we are of the opinion, and so determine, that the tape recorded confessions were admissible in evidence for the reasons advanced in our ruling on assignment of error number 4.

Assignment of Error No. 6

"The court erred in not allowing defendant's counsel in final argument to the jury to comment that the State failed to call two witnesses, Haywood Manning and Anita Watson, whose names frequently were mentioned in the trial by the State."

The following mandate appears under Crim. R. 16(C)(3):

"Witness list; no comment. The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial."

Within the terms of this Rule, there is found the court's authority for ruling as it did. We find no prejudicial error here. If the defendant desired testimony

from Manning or Watson, he could have secured it by subpoena and then commented upon it to the jury.

Assignment of Error No. 7

"The court erred in not dismissing Count #2 charging the defendant with violating Ohio Revised Code 2911.01 for the reason that 2911.01 is ambiguous, vague and does not specifically recite an offense."

The section of the Revised Code here under attack, R.C. 2911.01, reads:

"Aggravated robbery.

"(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

- (1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;
- (2) Inflict, or attempt to inflict serious physical harm on another.

"(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

Theft offense is defined in R.C. 2913.01(K), *inter alia*, as a violation of R.C. 2913.02. This section provides:

"Theft.

"(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

"(1) Without the consent of the owner or person authorized to give consent;

"***

"(4) By threat.

"***."

It is obvious to this court that R.C. 2911.01 when read in the light of R.C. 2913.02 gives to a defendant, and to this defendant in particular, the elements which must be established to prove the crime with which he is charged.

In the trial of the instant case, it was established by competent evidence that the defendant deprived the victim, Eshack, of his wallet and money without his consent; that he did so with a deadly weapon, the discharge of which caused death. The statute here under attack covers this entire series of events and cannot be said to be "ambiguous" and "vague" and to not "specifically recite an offense." Furthermore, if the defendant was uncertain as to the crime with which he was charged, he had ample opportunity to request a bill of particulars by virtue of Crim. R. 7(B). This he did not do.

Assignment of Error #8

"The court erred in its charge to the jury when it instructed the jury that the purpose to kill must (emphasis added) be inferred from the use of said weapon."

This alleged error misstates the charge of the court. The court's charge was correctly given in the following terms:

"The purpose with which a person does an act is known only to himself unless he expresses it to another or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means and method and the weapon used, and all other facts and circumstances in evidence.

"If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill must be inferred from the use of said weapon. Both an inference of intent to kill and an inference of malice may be inferred from the facts and circumstances of an unlawful killing where a deadly weapon is used."

While this alleged error is not well taken as a matter of law, it will be further observed that the defendant did not object to the charge or request a correction. Crim. R. 30 provides in pertinent part:

"***

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Assignment of Error No. 8 is overruled.

Assignment of Error No. 9

"The Ohio statutes with reference to aggravated murder, a capital offence (sic) and the related sections dealing with death in the electric chair are unconstitutional for the reason that the mitigating circumstance of mental deficiency has no definition in law, is vague, ambiguous and impossible to ascertain with any degree of uniformity."

The defendant's challenge in this assignment of error relates to R.C. 2929.04(B)(3) and is titled "Criteria for imposing death or imprisonment for a capital offense." Under this section of the Code, the death sentence is precluded if:

"The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The jury returned its verdict of guilty and thereafter the trial judge conducted a formal hearing on the question of whether the offense was committed primarily as the result of the offender's "psychosis or mental deficiency."

The finding of the trial court that the defendant did not fall within the class of persons excused from capital punishment under the provisions of the code was not something that fell within the court's discretion. It was a finding based upon evidence and we find that it amply sustained the

Humble criteria

court's ruling. Compare, State v. Leigh, 31 Ohio St. 2d 97 (1972).

The defendant argues that the language of the statute establishing criteria for the imposition of the death penalty is unconstitutional in that "mental deficiency has no definition in law, is vague, ambiguous and impossible to ascertain with any degree of uniformity."

It is a well settled rule in this State that words in common use will be construed in their ordinary acceptance and significance and with a meaning commonly attributed to them. A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to it.

A number of psychiatrists and psychologists testified at the mitigation hearing following the jury verdict. A Dr. Villaba, psychiatrist, referred to a manual of mental disorders made by the American Psychiatric Association and stated that the words "mental retardation" and "mental deficiency" are synonymous. The manual defines mental retardation as follows:

"*** to subnormal general intellectual functioning which originates during the development period and is associated with impairment of either learning and social adjustment, or maturation, or both."

A Dr. Migdall, psychiatrist, defined "mental deficiency" as follows:

"*** the ability to learn with support and also to be able to make somewhat adequate adjustment to society."

All of the experts who testified equated mental deficiency with mental retardation or an aspect of it.

Webster's Third International Dictionary defines the terms as follows:

"Deficient: lacking in some quality, faculty or characteristic;

"Retarded: Slow or limited in intellectual development, in emotional development, or academic progress."

It appears to be proper legal reasoning to hold that a person with a limited intellectual or emotional development lacks a quality or faculty; that it is fair to utilize the definition in Section 5123.68 M or that of the American Psychiatric Society. Both refer to subnormal intellectual functioning, impairment or deficiencies in behavior or social adjustment. R.C. 5123.68(M) stipulates under the chapter of "hospitals for mentally ill and mentally retarded" that "A 'mentally retarded' person means a person having significantly subaverage general intellectual functioning existing concurrently with deficiencies in adaptive behavior, manifested through the development period." The American

Psychiatric Society, *supra*.

We find that the code sections in controversy do not contain the weakness claimed, but that to the contrary meet the constitutional mandate and can be applied uniformly.

This assignment of error is overruled.

Assignment of Error No. 10

"The Ohio statute with reference to aggravated murder and related sections dealing with death in the electric chair are unconstitutional for the reason that it does not assure the equal protection of the laws."

The Supreme Court of the United States in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346 (1972) is authority for the rule that the death penalty as imposed, within the discretion of a jury, violates the United States Constitution (Eighth Amendment) forbidding cruel and unusual punishment.

Following this decision, the Supreme Court of Ohio held in *State v. Leigh*, *supra*, that under existing law the death penalty was prohibitive. Soon thereafter, Ohio changed its law relative to the imposition of the death penalty. At the time of the trial herein, the statutes provided that the jury determine the factual questions of whether the defendant committed the murder and if he did whether he did it in a specific aggravated manner. The jury does not determine the penalty. To satisfy the objection of the Supreme Court

of the United States a bifurcated procedure was created. Now the penalty is determined by the court at a mitigation hearing after the jury has returned its verdict. R.C. 2929.03 and R.C. 2929.04.

This court in the case of State v. Bayless, (No. 7513, 9th Dist. Ct. App., February 5, 1975), held that the new statutory procedure adopted by the legislature following State v. Leigh, *supra*, met all constitutional requirements and as a consequence the imposition of the death penalty was constitutionally sound. We approve the holding in the Bayless case and in applying it here, we find this assignment of error is not well taken and as a consequence we overrule it.

Assignment of Error 11

"The court erred in its letter to Abdon Villalba, and Elliot Migdal, psychiatrists, with reference to the court's definition of mental deficiency."

This assignment of error is not well taken. The court made the ultimate decision on the question of mitigating circumstances. The psychiatrists supplied evidence only which, of course, was weighed by the court. We find no error of a prejudicial character here.

Assignment of Error 12

"The court's finding that the defendant failed to prove that the offense of aggravated murder was not the product of mental deficiency is manifestly against the weight of the evidence.

There is evidence indicating that the defendant was below the average in intellectual functioning. However, expert evidence gives great weight to the fact he was not mentally deficient or retarded. He was a graduate of one of the local high schools. Despite this fact, there is evidence that he was educationally deficient. Educational deficiency does not, however, equate with mental deficiency.

The evidence before the trial court was amply sufficient to sustain the court's judgment and no error can be assigned thereto.

This case establishes a cruel and vicious murder committed in the process of a willful and intentional robbery. The State has proved the essential elements of the statutory charge made in the indictment and has afforded the defendant every constitutional and statutory right to which he was entitled. There is no error of a prejudicial character in the record before us. As a consequence, the judgment must and hereby is affirmed in all respects.

The court finds that there were reasonable grounds for
(29)

this appeal.

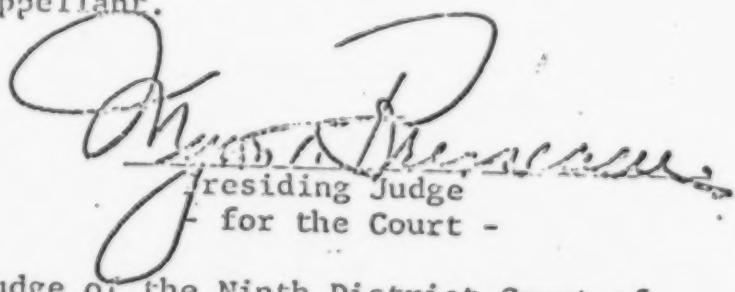
It is ordered that a special mandate issue from this court, directing the Court of Common Pleas to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Costs taxed to appellant.

Exceptions.

BRENNEMAN, P.J. and
HARVEY, J. CONCUR.



John J. Doyle
Residing Judge
for the Court -

(Doyle, J., retired Judge of the Ninth District Court of Appeals, and Harvey, J., retired Judge of the Court of Common Pleas of Summit County, sitting by assignment under authority of Article IV, Section 6.(C), Constitution).

APPEARANCES:

STEPHAN M. GABALAC, Summit County Prosecutor, (Fred Zuch, Asst. Prosecutor), City-County Safety Building, 53 East Center Street, Akron, Ohio 44308, for Plaintiff-Appellee.
TED CHUPARKOFF, Attorney at Law, 501 East Exchange Street, Akron, Ohio 44304 for Defendant-Appellant.

THE STATE OF OHIO
vs.
FLOYD EDWARDS

No. 75 1 52

JOURNAL ENTRY

COPY

THIS DAY, to-wit: The 2nd day of May, A.D., 1975, upon due consideration of the Court, IT IS HEREBY ORDERED that this Journal Entry be filed NUNC PRO TUNC to correct in part the fourth (4th) paragraph of the Journal Entry dated April 30, 1975.

THEREUPON, IT IS THE SENTENCE OF THE LAW AND JUDGMENT OF THE COURT that the said Defendant be taken hence by the Sheriff to the Summit County Jail and there safely kept, and that within Thirty (30) Days the said Defendant be conveyed by the Sheriff to the CHILLICOTHE CORRECTIONAL INSTITUTE, at Chillicothe, Ohio, and thereafter to be delivered to the Warden of the SOUTHERN OHIO CORRECTIONAL FACILITY, at Lucasville, Ohio, and that he safely be kept there until the first day of September, A.D., 1975, on which day, within the enclosure, inside the walls of the said SOUTHERN OHIO CORRECTIONAL FACILITY, prepared for that purpose, according to law, the said Defendant, FLOYD EDWARDS, shall be electrocuted by the Warden of the said SOUTHERN OHIO CORRECTIONAL FACILITY, or in case of the Warden's death or inability, or absence, by a Deputy Warden of said Institute; that the said Warden or his duly authorized Deputy, shall cause to pass through the body of the said FLOYD EDWARDS, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity shall be continued by said Warden of said Institute, or said Deputy Warden, until the said Defendant, FLOYD EDWARDS, is dead, for punishment of the crime of AGGRAVATED MURDER, with specification, Count One (1) of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony.

APPROVED:
May 2, 1975

COPY

JANUARY

Term 1975

THE STATE OF OHIO
vs.
FLOYD EDWARDS

No. 75 1 52

JOURNAL ENTRY

COPY

THIS DAY, to-wit: The first day of May, A.D., 1975, now comes the Prosecuting Attorney, by Assistant Prosecutor FREDERIC L. ZUCH, on behalf of the State of Ohio, the defendant, FLOYD EDWARDS, being in open Court with counsel, THEODORE CHUPARKOFF, for further hearing in this matter.

THEREUPON, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him, regarding the charge of Aggravated Robbery, and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

THEREUPON, IT IS THE SENTENCE OF THE LAW AND THE JUDGMENT OF THE COURT, as a continuation of this Court's sentencing order of April 30, 1975, that the Defendant, FLOYD EDWARDS, be imprisoned Institute and confined in the Chillicothe Correctional for an indeterminate period of not less than SEVEN (7) YEARS and not more than the maximum of TWENTY-FIVE (25) YEARS for the punishment of the crime of AGGRAVATED ROBBERY, Count Two (2), Ohio Revised Code Section 2911.01, a felony of the first (1st) degree; said sentence shall be served concurrently with this Court's order of death regarding the companion conviction in this case of Aggravated Murder, issued on April 30, 1975.

IT IS FURTHER ORDERED that the Defendant, FLOYD EDWARDS, pay the costs of this prosecution (Aggravated Murder and Aggravated Robbery) for which judgment is hereby rendered against him; including counsel fees to be set at a later date to be allowed to Attorneys Theodore Chuparkoff and Charles D. Parke; said monies to be paid

(OVER)

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to the Summit County Clerk of Courts, Summit County Courthouse,
Akron, Ohio 44308.

THEREUPON, the Court informed the Defendant of his right to appeal pursuant to Rule 32(A) (2), Criminal Rules of Procedure, Ohio Supreme Court, and Attorneys Theodore Chuparkoff, and Charles D. Parke, are hereby appointed to prosecute the Defendant's appeal.

APPROVED:
May 1, 1975

FREDERIC L. ZUCH
Assistant Prosecuting Attorney
mas

JAMES V. BARBUTO, JUDGE
Court of Common Pleas
Summit County, Ohio

cc: Booking, Summit County Jail
cc: Attorney Theodore Chuparkoff
cc: Attorney Charles D. Parke

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Term 19 75

THE STATE OF OHIO
FLOYD EDWARDS

No. 75 1 52

JOURNAL ENTRY

COPY

THIS DAY, to-wit: The 30th day of April, A.D., 1975, now comes the Prosecuting Attorney, STEPHAN M. GABALAC, by Assistant Prosecutors FREDERIC L. ZUCH, and JAMES A. RUDGERS, on behalf of the State of Ohio, the Defendant, FLOYD EDWARDS, being in open Court with counsel, THEODORE CHUPARKOFF, and for further hearing in this matter.

The Court, having heard testimony in this matter presented on April 29, 1975, and upon due consideration hereof, finds that there are no mitigating circumstances present.

THEREUPON, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and hearing from the Defendant and no showing of good and sufficient cause being demonstrated as to why judgment should not be pronounced:

THEREUPON, IT IS THE SENTENCE OF THE LAW AND JUDGMENT OF THE COURT, that the said Defendant be taken hence by the Sheriff of the Summit County Jail and there safely kept, and that within thirty (30) days the said Defendant be conveyed by the Sheriff to the CHILLICOTHE INSTITUTE CORRECTIONAL, and deliver him to the Warden of said Institution, and that he there be safely kept until the first day of September, A.D., 1975, on which day, within the enclosure provided, inside the walls of the said Chillicothe Correctional prepared for that purpose, according to law, the said Defendant, FLOYD EDWARDS, shall be electrocuted by the Warden of the said Chillicothe Correctional or in case of the Warden's death or inability, or absence, by a Deputy Warden of said Institution, that the Warden or his duly authorized Deputy, shall cause to pass through the body of the said FLOYD EDWARDS, a current of electricity of sufficient intensity to

COPY (OVER)

cause death, and that the application of such current of electricity shall be continued by said Warden of said Institution, or said Deputy Warden, until the said Defendant, **FLOYD EDWARDS**, is dead, for punishment of the crime of AGGRAVATED MURDER, with specification, Count One (1) of the Indictment, Ohio Revised Code Section 2903.01, a special felony.

IT IS FURTHER ORDERED that the Defendant, **FLOYD EDWARDS**, again be brought before this Court on May 1, 1975, at 8:45 A.M., to be sentenced on the companion charge, in this case, of Aggravated Robbery.

APPROVED:
April 30, 1975

FREDERIC L. ZUCH
Assistant Prosecuting Attorney

JAMES A. RUDGERS
Assistant Prosecuting Attorney
mas

JAMES V. BARBUTO, JUDGE
Court of Common Pleas
Summit County, Ohio

cc: - BOOKING
cc: Attorney Theodore Chuparkoff
cc: - Charles D. Parke

No.	Page	COMMON PLEAS COURT Summit County, Ohio	JOURNAL ENTRY	THE STATE OF OHIO	Entered	19	Hon. Judge Presiding	serve
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THE STATE OF OHIO
vs.
FLOYD EDWARDS

No. 25152

JOURNAL ENTRY

COPY

THIS DAY, to-wit: The 7th day of March, A.D., 1975, came the Prosecuting Attorney, on behalf of the State of Ohio, the Defendant, FLOYD EDWARDS, being in Court in custody of the Sheriff and accompanied by counsel, CHARLES D. PARKE and THEODORE CHUPARKOFF, for trial herein. HERETOFORE, on March 5, 1975, a Jury was duly empaneled and sworn, and the trial commenced and, not being completed, adjourned from day to day until March 6, 1975, at 3:45 o'clock P.M., at which time the Jury having heard the testimony adduced by both parties hereto, the arguments of counsel, and the charge of the Court, retired to their room for deliberation. And thereafter, said Jury having been sequestered, came again into Court on March 7, 1975, at 11:53 o'clock A.M., and returned their verdict in writing finding said Defendant GUILTY as charged in Count Number One (1) of the Indictment, to-wit: AGGRAVATED MURDER, a special felony in violation of Section 2903.01 of the Ohio Revised Code, and further finding the Defendant NOT GUILTY of Specification One (1) [2929.04(A)(3)] to Count One (1), and GUILTY of Specification Two (2) [2929.04(A)(7)] to Count One (1). Said Jury further found said Defendant GUILTY as charged in Count Two (2), of the Indictment, to-wit: AGGRAVATED ROBBERY, a felony of the first degree in violation of Section 2911.01 of the Ohio Revised Code.

IT IS FURTHER ORDERED pursuant to the above verdict, that a pre-sentence investigation and a psychiatric examination be made forthwith, concerning the Defendant, the report of said examinations to be submitted to this Court.

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IT IS FURTHER ORDERED that DOCTOR ABDON VILLALBA be appointed to conduct the above referred to psychiatric examination of the Defendant to determine whether or not the offenses in the above case were primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

In the event that DOCTOR VILLALBA is unable to conduct said examination, IT IS FURTHER ORDERED that the Summit County Psycho-Diagnostic Clinic perform said examination through its facilities.

IT IS FURTHER ORDERED that this matter be set for hearing upon the completion of the above referred to examinations, and that the Defendant be remanded to the Summit County Jail to await further hearing concerning sentence.

APPROVED:
March 7, 1975

FREDERIC L. ZUCH
Assistant Prosecuting Attorney

JAMES A. RUDGERS
Assistant Prosecuting Attorney
mas

JAMES V. BARBUTO
Court of Common Pleas
Summit County, Ohio

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COMMON PLEAS COURT		
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on. _____ Judge Presiding		

REVISED CODE SECTION: 2903.01 (B)
2911.01

In the Common Pleas Court of Summit County, Ohio, of the term of

JANUARY

in the year of our Lord, One Thousand Nine

Hundred and SEVENTY-FIVE

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, being duly impanelled and sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO,

DO FIND AND PRESENT, That FLOYD EDWARDS

on or about the 28th day of December, 1974, at the County of Summit, aforesaid, did commit the crime of AGGRAVATED MURDER

in that he did purposely cause the death of Joesph Eshack, Jr., while said Defendant was committing, or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery (2911.01), said death being contrary to Ohio Revised Code 2903.01 (B), and further said cause of death being done under aggravating circumstances, to-wit:

Specification (1) to Count (1) 2929.04 (A) 3

The Grand Jurors further find and specify that said offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by said Defendant, to-wit: Aggravated Robbery 2911.01

Specification (2) to Count (1) 2929.04 (A)

The Grand Jurors further find and specify that the offense presented above, the killing of Joesph Eshack, Jr., was committed while the said Defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery, 2911.01

COUNT TWO

And the Grand Jurors of the State of Ohio, within and for the body of the County of Summit aforesaid, on their oaths in the name and by the authority of the State of Ohio, DO FURTHER FIND AND PRESENT, That FLOYD EDWARDS, at the County of Summit and State of Ohio, on or about the 28th day of December A.D., 1974, at the County of Summit, did commit Aggravated Robbery, to-wit: that said FLOYD EDWARDS while he was attempting to commit or was committing a theft offense as defined in 2913.01 of Ohio Revised Code, to-wit: said Defendant FLOYD EDWARDS, did take and deprive Joesph Eshack, Jr of certain United States Currency in the amount of SIXTY-FIVE DOLLARS, (\$65.00); or while fleeing immediately after such attempt or offense did inflict serious physical harm to another, ie., he did kill Joesph Eshack, Jr. in the City of Akron, County of Summit and State of Ohio, with a deadly weapon, to-wit: a Pistol, said offense of Aggravated Robbery in violation of Ohio Revised Code Section 2911.01 (A) (1) and/or (2), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

(SIGNED) STEPHAN M. GABALAC
STEPHAN M. GABALAC
Prosecuting Attorney JS/bas

A TRUE BILL

(SIGNED) V. BECK BODAGER
V. BECK BODAGER
Foreman of the Grand Jury

asking that the report of Dr. Migdal be made available only to Counsel and not to the Prosecution; and as it turned out, I think, that we had some basis for that because as Your Honor knows in the report Dr. Migdal relates the facts of the case as related to him by the defendant. Your Honor is familiar with that. And we are claiming that this is highly prejudicial because this report was sent to the Prosecutor and it could very well have a bearing on the prosecution of this case, giving them the facts which they may not have already been aware of. It might cause them to present witnesses they might not have otherwise presented.

Secondly, in connection with that, Your Honor, I want to put this in the record that I think the Statute as to examination of the defendant contemplates examination after conviction. It talks about pre-sentence examination. And this, of course, was the purpose of Your Honor's examination, to determine the possible mental deficiency of the defendant.

My purpose
COURT: No. That's not my purpose. So don't read that into the record. I do that to determine whether or not this person should stand trial, at least to get an insight into this particular person. I always have them start the pre-sentence and start the psychiatric evaluation but not for that ultimate purpose because I

don't know if that's ever going to come about. How do I know what the jury is going to do, Mr. Parke?

MR. PARKE: Well, that's right.

COURT: So, therefore, I'm not going to make a judgment on this case. I can't.

MR. PARKE: That's right, but Your Honor is sitting as a judge of this case.

COURT: That may be, but the point is I don't make the decision. The jury does in this case. But go ahead. Go ahead with your motion.

MR. PARKE: Well, Your Honor, that motion is before you?

COURT: Yes.

MR. PARKE: By sending the report to the Prosecutor that the rights of the defendant have been prejudiced in this case where there is a confession that's related in the report.

COURT: Okay. Anything else on that motion?

MR. PARKE: No, Your Honor.

COURT: Who is going -- you may proceed?

MR. RUDGERS: Just a couple points -- The State doesn't know why the examination was ordered. I would assume to find out whether the defendant is competent to stand trial for these charges which is

entirely within the prerogative of the Court and authorized by the statute and that report, a report based on whether or not the defendant is competent to stand trial becomes part of the public record.

Secondly, I don't think the Defense has shown how they have been prejudiced by the Prosecutor receiving a copy of this report, and until such time as they can, I don't think there's any use to consider the motion any farther.

Finally, there's nothing in that report that the prosecution did not already know by way of statements made by the defendant prior to his arrest and so there's no chance that we could have obtained information that would have led to other witnesses or other evidence from that report.

COURT: All right. Motion is denied.

COURT: The next motion?

MR. PARKE: Your Honor, I would like to make an oral motion at this time?

COURT: Sure.

MR. PARKE: Your Honor, at this time the defendant moves that the Prosecution make the indictment definite and certain and also to elect between items of the specifications between the specifications themselves.

In the indictment there are several specifications made that the offense was committed for the purpose --- Specification 1, Count 1, escaping detection, apprehension, trial or punishment for another offense.

And then Specification 2, that it was the offense presented was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing.

Now which is it? We are asking at this time that the Prosecution specify which of the specifications and portion of the specifications they are relying upon.

COURT: Overruled.

COURT: Next motion?

MR. PARKE: Your Honor, we also ask that Count 2 of the indictment be dismissed for not stating a cause of action or not stating that a crime has been committed for this reason.

Now, Count 2 relates -- supposedly relates to aggravated robbery.

COURT: Uh huh.

MR. PARKE: And in the definition of theft which is Revised Code Section 2913.02, which of course is one of the things that has to be proved in connection with

Obviously, also aggravated robbery in and of itself is a theft offense. So by circular reasoning it obviously states a cause of action.

In regards to Branch 2, the language of defining theft offense — whether or not the statute does not say, or in regarding the different types of theft, the Ninth District Court of Appeals promulgated State vs Rose Dugger, acknowledges some defect in the language but the Court held that the language is valid by normal, common sense reasoning through statutory interpretation.

The issue has been raised and decided by the Ninth District Court of Appeals, just this morning.

MR. PARKE: Your Honor, I hope you excuse the defendant for not knowing about a decision made this morning.

COURT: No problem. Overruled.

COURT: Next?

MR. PARKE: Now, Your Honor, the final motion that we have is a motion in writing. Do you have a copy of that? It's called Motion to Suppress Statements made by defendant, filed on February 13.

COURT: Yes, I have it now.

MR. PARKE: Your Honor, in connection with that motion I believe — well, we would like the defendant

Q The defendant was brought down to the Station at 5:30. How long was he in the Interrogation Room from beginning to end?

A From the time he was picked up until the time he was booked?

Q Yes?

A I believe it was after 3:00 A.M., according to the book.

Q If I told you he was booked more like 5:00 o'clock, might that be an accurate statement?

A That could be better.

Q The defendant was in the Interrogation Room for 11 hours?

A Yes, sir.

Q And describe the Interrogation Room?

A Oh, it's a room about six foot wide and nine foot long.

Q And during the course of those 11 hours, how many different people walked into that room and talked to him or asked him questions?

A Four.

MR. RUDGERS: That you know of. Right?

A That I know of.

Q That you know of. Who are they?

A Prosecutor Shoemaker, Detective Goodwell, Detective Craig and myself.

Q How about Mr. Zuch?

A And Mr. Zuch. That's right, sir.

to look at the card and read it?

A Yes, sir.

Q Was it ever ascertained that he in fact was able to read it or did you just assume that he could?

A We assumed that he could.

Q Okay. And I take it you assumed he understood what you were telling him?

A Yes, sir.

Q And it's based upon an assumption, you really don't have any knowledge or facts that he understood what his rights were or what the Miranda ruling was, isn't that a fact?

A It was all explained to him, sir.

Q But you are assuming that he understood it, right?

A Being a graduate of high school, we assumed he could read and write, yes.

Q If it turned out he couldn't read, would that change your assumption?

MR. RUDGERS: Object.

COURT: I'm going to sustain that.

MR. CHUPARKOFF: I think the evidence will be, Your Honor, he can't read.

COURT: Well, so he can't read. That's a question for the jury to determine that.

MR. CHUPARKOFF: All right.

Q Now, how long was he in the Interrogation Room with you

A Detective Goodwell and I went to the house where he was reportedly staying. We sat on the house. Pretty soon Mr. Edwards left the house. At that time we followed him and called for another cruiser to stop the car, and picked him up at that time.

Q What did you say to him? What did he say to you at that time?

A I told him that Sgt. Cross would like to talk to him at the Police Station. He said Okay.

Q Then he got in the cruiser, came down to the Police Station?

A Yes, sir.

Q You put him in the interrogation room at the Detective Bureau, 6th Floor?

A Yes, Room 9.

Q Did you have occasion to talk to him from that time until you left your shift?

A Yes, sir.

Q Okay. When did you have occasion to talk to him?

A When we first got to the Station, Detective Goodwell, in my presence, read him his Miranda Warnings.

Q Did he read those warnings from a card?

A Yes, sir.

Q Do you have a card with you?

A I have a similar card.

A Well, Grover told him, "We have another witness in another room. You don't have to give us a statement."

Q But we know you did it?

A "We already know. You can or you can't -- you can do it or you don't have to."

Q But in the same breath didn't Grover Goodwell say, "If you tell us, the Court might take that under consideration; it would help you."

A I don't remember him saying that.

Q You don't remember him saying that?

A No, sir.

Q By your not remembering that, he may have said that?

A I can't say he didn't say it, no, sir.

Q Okay. When you say you can't say he didn't say it, he is your assigned partner?

A Yes, sir.

Q Have you ever heard him say that in trying to take a statement from an accused?

MR. RUDGERS: Object.

COURT: Sustained.

Q In your presence was he asked to read the Miranda card?

A I don't remember. I don't think so. I don't remember.

MR. CHUPARKOFF: We have nothing further,
Your Honor.

COURT: You may step down.

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I didn't know nothing about what he says. I told him if he wanted to believe what Haywood told him, go ahead.

Q Go ahead.

A After that he said, Haywood already said you done killed the man; he already told us everything so you go ahead and tell us, we will make it easy on you; the Court will look at that.

Q The Court will what?

A The Court will look at that.

Q Go ahead.

A After that his partner came back in.

Q Would that be Mr. Craig?

A Yes, the one just left off the stand.

Q All right.

A Then he asked him, "Did he admit it?"

Q I'm sorry?

A Then he asked, "Did he admit it?" His partner said, "No, he didn't admit nothing." They both went out the room. The Detective that was on the stand said Sgt. Cross didn't come in until Six. He didn't come in until 7:00 o'clock.

Q How long were you in the room before Mr. Cross came in?

A About an hour and a half.

Q Now, during the hour and a half that you were there, did Craig and Goodwell talk to you?

A Yes.

A Yes.

Q Did Mr. Cross read from a card?

A When he first came in?

Q Yeah?

A No.

Q Well, how long after you and he talked did he read from a card?

A It was about— I'd say about five or ten minutes later, then he read the card to me.

Q Okay. Did you tell him you did it, before he read the card?

A No. I told him I didn't know what he was talking about.

Q Did Goodwell or did Craig tell you that they knew all about it; you might as well tell so the Court would go easy on you at this point?

A Yes, they did.

Q They again told you this?

A Yes.

Q Eventually, did you in fact tell Cross that you were involved?

A Yes.

Q Why did you tell him?

A He told me, well, if I told the truth about it, the Court would be lenient on me; so that's why I done it.

Q Then you went ahead and told him, is that right?

A Yes.

Q Before he read from the card?

A Yes.

Q But at one time he did read from a card?

A Yes.

Q Did it sound like the same card that Cross said he read?

A Yes, it did.

Q Did Shoemaker ever ask you whether you wanted a lawyer?

A No, he didn't.

Q Did Shoemaker ever ask if you could afford a lawyer?

A No.

Q Did you testify that Mr. Shoemaker in fact showed you a card and asked you to read it?

A Yes.

Q Did you have a card in your hand?

A Yes.

Q Did you look at a card?

A Yes.

Q Did you understand everything Shoemaker was telling you?

A No.

Q Floyd, you graduated from high school?

A Yes.

Q I want to show you this card. I want you to be honest.
If you can read it, I want you to read it. If you can't
read it, I want you to try -- the whole thing.

error, exceptions are preserved. Anything else?

MR. PARKE: That's all.

MR. CHUPARKOFF: That's all.

* * * * *

COURT: I'd like to bring the jury in, swear them in and let them go to lunch; start taking testimony immediately after lunch. Do you want to make opening statements now? Let's do it that way.

* * * * *

this Court.

MR. CHUPARKOFF: Okay.

COURT: I am finding: 1. The Miranda Warnings were given to him. He understood them. He complied with them. 2. I find no duress at all.

As far as the missing link between the tape, it's been explained to the Court's satisfaction, that there was nothing subversive or illegal about what transpired as far as anybody was concerned. There's no question in the Court's mind that he specifically knew his rights because both the Police Department and the Prosecutor's Office went overboard in making sure that he understood his constitutional rights. At least that's the way the Court sees it. And, well, I'm going to make my ruling.

MR. PARKE: Defendant excepts to that.

COURT: I can't hear you?

MR. PARKE: Defendant excepts to the ruling of the Court.

COURT: Yes. You may have your exception throughout this trial. You may have a continuing objection as far as you are concerned, as far as the defendant is concerned. So we don't have to worry about that. The record is protected, and I so instruct Ruth Hill, the court reporter, to make sure if there's any

(Motion out of the hearing of the Jury)

MR. CHUPARKOFF: The Defense objects to the calling to the stand of witness Ron Davis as a witness for the State for the reason that under the Rules of Criminal Procedure the prosecution was required to give us a list of all of their witnesses. They did not give us the name of Ronald Davis, and therefore we object to him testifying.

MR. ZUCH: I would also like to put into the record, on behalf of the State of Ohio, that the Defense Counsel in this case has been given full discovery, all physical evidence including photographs and shell casings, that this witness will testify to.

The State of Ohio learned yesterday that their lead-off witness, Mr. Mack Davis Newberry, had a stroke and is currently in Akron General Hospital. The State does not represent that they were not going to call this witness. We did intend to call the Uniformed Officer, being the first on the scene representing a police agency. It's by inadvertence that this witness' name was not on the witness list.

MR. RUDGERS: Much of what Mack Newberry could have testified to, this Officer would have just corroborated. Mr. Newberry suffered a heart attack. I talked to his doctor, Howard Shapiro, last evening. He

said it would be impossible for him to testify today.

MR. CHUPARKOFF: The Defense takes the position that we are prejudiced by their failure to include him as a witness, if for no other reason than the rules of discovery permit us to analyze the witnesses and what each will testify to, and we have a right to judge our case and base our defense upon what the prosecution says the evidence would have been.

COURT: Overrule your motion.

COURT: Proceed.

By Mr. Zuch:

Q Officer Davis, did you in fact arrive at 223 Wooster Avenue location on December 28, 1974?

A Yes, sir, we did.

Q I believe you stated the time. Would you repeat it?

A I received the call at 6:19; got there approximately 6:23.

Q What did you observe as you arrived at the scene?

A As we pulled upon the scene, an older colored gentleman was standing to the west of the building, and in front of the Comet Tool Sales was a white Toyota Station Wagon. I also observed in Comet Tool there was a light on and the door partially open about three inches.

Q What is the next thing you did, Officer?

A We got out of the car. As we approached, my partner went to talk to this gentleman, as he motioned toward the inside of the building. And at that point I looked inside the building and saw a man inside.

Q What was the approximate position of the man inside the building?

A It was about ten yards inside the building in the center of the aisle.

Q What was the condition of the inside of the room which you saw the man?

A Condition of the room was very much in disorder; machine parts, tools, etc., all over the place, complete disarray.

Q Was there walk space inside this particular room?

A A very narrow, somewhat of a path through the center of all these tools and junk almost, right straight through the center of it.

Q Upon making these observations, what did you do next?

A I motioned to my partner, told him that there was a man inside which is apparently what this fellow was telling my partner at the same time. So we approached the door. I entered first, pushing the door open and we entered, looking around. We could see this gentleman was slumped over in the center of the aisle. We proceeded forward, and I was checking to make sure, as well as I could, that there was no one else around; and also in an attempt to

determine what the problem was at that point.

Q And what did you do next?

A At that point I went over to the gentleman who was slumped over in the middle of the aisle, obviously in a face-down position. And I felt the neck, the carotid artery to determine if there was pulse. There was not. I pulled up the right shoulder of this body enough to get a look, and at that point I could see his face was turning blue; and I released him, let him back down.

Q Did you significantly move the body or was this just--

A No. It was just a movement of approximately 12 to 18 inches, just enough to get a partial look.

Q Did you return the body to the position it was when you found it?

A Yes. I let the shoulder back down gently.

Q What is the next thing you did, Officer?

A Well, in the position that I was, somewhat in a semi — you might say, half-bent over state. I began to stand up. As I looked to my right, I saw a shell casing on a piece of paper to my right.

Q Okay. In relation to the body, where would the shell casing have been?

A Somewhere between 18 and 30 inches to the rear and to the right of the body.

Q Okay. What did you do next, Officer?

A Okay. I was directed to a shell casing that was off to the right of the body, and at this time there was no indication of whether this was a natural death or a person had been shot or what. I then went to the victim, trying to determine if this was a natural death or some other type of death. And so I examined the back of the person, which indicated nothing. Further examination, in covering the back of the head with my fingers, I discovered some blood and at this time then I observed some type of a wound at the back of the head, approximately two inches above the hair line.

Q Continue.

A So at this time I took some photographs, some color slides of the victim on the floor from a couple different angles before I moved the body at all. After the photographs were taken I went back to the body before I moved it, gave it a pat-down search for identification of back pockets, which would be the possible place for a wallet. I did not find anything, so at this time I asked if it was all right to move the body -- if they were done so we could go further with the examination.

Q Did you in fact move the body?

A Yes, I did.

Q Okay. And would you explain how that was done and what you observed during that process?

greater than three feet.

Q Now, during your autopsy you have indicated you had occasion to conduct an external examination of the gunshot wound in Joseph Eshack, Jr.'s head. Did you find, Doctor,
the presence of any fouling or stippling?

A No, sir.

Q Did you examine the entrance wound itself?

A Yes, both visually and also the entrance wound was excised and examined microscopically.

Q You say excised. What does excised mean?

A Cut out.

Q Cut out?

A To observe.

Q And examined microscopically? The examination of that wound, did it indicate the presence of any fouling or stippling?

A No, sir.

Q Doctor, based on your training and experience, based on the examination of Joseph Eshack, Jr., do you have an opinion as to the cause of death in this case?

A Yes, sir.

Q What is that opinion, Doctor?

A Opinion is that he died as result of a laceration of the brain as result of a penetrating gunshot wound in the head.

A Well, upon moving -- it was difficult in moving the person. He was in a kneeling position and I had to lift him up and off to the side to where we could even step around. The room was cluttered with different articles, but in doing so, in lifting the shoulder and pulling him back, there were eye glasses and a hat underneath his face. At that time then, after I could get myself squared around, I took a photograph of his hat and the glasses before I moved it -- took a photograph of this, then checked the glasses and the hat, which the hat there was a small amount of blood and the glasses had a little bit of blood on them. They were not broken, bent or anything like that. After moving this, then I assisted the ambulance crew in putting sheets around the victim so he could be moved out. I was unable to get an ambulance stretcher into the scene.

Q The reason for that being?

A Well, the articles on the floor. It was just too difficult to bring an ambulance cot and put the cot down and carry him out this way. We had to carry him out on sheets because of the room being so cluttered.

Q Continue.

A After the victim was removed from the scene, I think I took another photograph of the scene after he was removed

A I went to the room where the decedent was put, and along with the Identification Officer who took photographs of the victim, took more photographs for identification purposes and such; also removed the belongings of the person from his pockets, along with the Akron Police Department noting down what was removed, which was some change, small tools, nuts, bolts, screws, miscellaneous items in his pocket. This was put with the Akron Police Department. Then I removed the clothing to determine if there was any other evidence of wounds, abrasions, lacerations or such. At that time there was none observed. Then the victim; the clothing was transported by ambulance by myself to the County Morgue.

Q Now, you stated that earlier you had looked for a wallet, after you got to the hospital and after you took the clothes from the victim did you ever determine whether or not there was a wallet?

A No. There was no wallet found on the person. There was

2--

MR. CHUPARKOFF: I will object. He's answered the question, Your Honor.

COURT: Put another question.

Q Did you find any money? You said you found some change?

A Well, there was change, to the best of my knowledge right now; I think five dollars something, some odd change.

A Yes.

Q Do you work, Gary?

A Yes.

Q Where do you work?

A Edgewood Homes.

Q Edgewood Homes?

A Yes.

Q What would be the formal name of your employer? What organization is that?

A Metropolitan Housing Corporation.

Q The Akron Metropolitan Housing Authority?

A Yes.

Q How long have you been employed there at the Edgewood Homes?

A About four months.

Q What are your duties there at the Edgewood Homes in your employment?

A Mopping hallways, sweeping hallways.

Q I'm going to call your attention now to approximately December 30, 1974, and do you remember whether you worked that day or not?

A Yes.

Q And did anything unusual happen in the course of your employment that day?

investigation?

A My partner and I, Detective Harris, spent the first day re-interviewing the family, the wife, Mrs. Eshack; went to the towing company, A-1 Towing Company, to check out the truck that was owned by Mr. Eshack. We talked to Mr. Newberry, the party that--

MR. CHUPARKOFF: Object.

COURT: Sustained.

Q Okay. Continue.

A We talked to several people that day, and for the following nine or ten days we talked to numerous people in regards to the investigation.

Q In the course of that investigation did you ever have occasion to examine a wallet?

A Yes, sir.

Q And the wallet that you examined, where did you obtain it?

A From the Police Property Room.

Q I hand you what has been marked State's Exhibit 13. Could you see if you could identify that, please?

A Yes, sir. This is the wallet that I examined the day I removed it from the Police Property Room.

Q Were you able in your examination, or did your examination reveal any particular name on the papers inside that wallet?

A There's numerous papers; several cards here with the

name Joseph Eshack on them.

Q To your knowledge was that wallet ever checked by the Akron Police Department for any type of fingerprints?

A Yes, sir. Detective Shaffer was the one that dusted the wallet and contents, some of the contents, for prints
but none were found.

Q Okay. Calling your attention to January 9, 1975, could you give us a run-down of your schedule that day in regards to the investigation of the homicide of Joseph Eshack?

A On that particular day we received information that Floyd Edwards may possibly be involved in the homicide. We worked several hours. We come up with the name of Haywood Manning, supposedly Floyd Edward's running buddy and best friend. We found out that Mr. Manning lived at 950 Lane Street.

Q Is that in the City of Akron?

A Yes, sir.

Q Continue.

A During the course of the afternoon we sat on the house at 950 Lane, watching for traffic in and out, but none appeared. At 4:00 o'clock, on return to the Station I passed the information on to Detectives Goodwell and Craig about the possibility of Floyd Edwards being involved and being with Haywood Manning, and if they

would stake the house out and if they seen any activity to pick the two men up; and if they did, to call me at home.

Q Later that day did you receive any notification?

A Yes, sir. About 5:30, I believe it was, I received information that Goodwell and Craig had both men at the Station, or were on their way into the Station.

MR. CHUPARKOFF: At this time, I anticipate the examination and not to interfere with Mr. Zuch's questioning we would at this point object to any further testimony on the basis of the two reasons we spoke to you earlier today.

COURT: Overruled.

MR. ZUCH: At this time also, Your Honor, in response to what we had talked about, the State would move State's Exhibit 13 into evidence.

MR. CHUPARKOFF: We would object.

COURT: Shall be admitted.

By Mr. Zuch:

Q Upon the notification that you have just referred to by Detectives Goodwell and Craig, what did you do next, Sergeant?

A I immediately left my home and returned to the Police Station.

Q Upon arriving at the Station, what did you do?

This tape is being started at 460 feet on side one of State's Exhibit 3. I would like you to listen to this tape and see if you can identify it.

A (Nods head.)

Q Is that a yes?

A Yes.

Q Thank you.

(Whereupon, the tape recorder is now playing:)

"Q Speaking is Assistant County Prosecutor John Shoemaker. I am located here on the sixth floor of the Akron Detective Bureau about quarter of three A.M. on January 10, 1975. Present here with me again is Mr. Floyd Edwards, and Mr. Edwards, I have already explained your rights to you, and I am going to go through this one more time because I am going to ask you about this firearm that I have in front of me. You got a light? Now, Mr. Edwards do you have -- do you understand that you have the right to remain silent?

A Yes.

Q Is that yes?

A Yes.

Q Do you understand that anything that you say could be used against you in a court of law?

A Yes.

kill the man. He told you the gun went off and he didn't want the gun to go off?

A He told us the gun went off.

Q He told you the gun went off with Stanford Harris' hands on the gun, isn't that right?

A Yes.

Q It's a question of whether you want to believe that or don't want to believe it, right?

A Yes.

Q You don't want to believe it?

A Right.

Q You don't have any other evidence to the contrary?

A Other than the position of the body and the way the story was given to us.

MR. CHUPARKOFF: Sgt. Cross, thank you very much.

REDIRECT EXAMINATION BY MR. ZUCH:

Q I have a couple questions on redirect. Did your investigation, after your discussing the matter with Mr. Manning, Mr. Edwards, Mr. Harris and the other people that you discussed it with in the course of your investigation, ever indicate that Hayward Manning was involved at all in the robbery?

MR. CHUPARKOFF: I will object to that.

COURT: He may answer.

Q Is this what was shown in your investigation that this happened?

A Yes, sir.

Q Okay, continue.

A Left the Comet Tool, walked back to the laundromat, told Mr. Manning that he just robbed and shot a man, Number Two; and the third point was the gun used was linked directly to Mr. Edwards by the owner of the gun, Mr. Debuice and was not linked with Mr. Harris at all. The billfold that was found was found at the Edgewood Apartments, 687 Warner Court, now this is where Mr. Edwards sleeps at night. He sleeps in the basement over in the Edgewood Homes and not Mr. Harris. We could never find any direct evidence at all to link Mr. Harris with Mr. Edwards and the killing.

Q Now, Mr. Chuparkoff mentioned some conversations that you had with Mr. Manning. I assumed that you learned the--

MR. CHUPARKOFF: I didn't testify as to any conversations he had with Mr. Manning.

MR. ZUCH: You asked him what he found out from Mr. Manning.

COURT: Pose the question.

Q Did you talk to Mr. Manning about his conversation with Mr. Edwards immediately after the killing of Joseph

Q Okay. So you had occasion then to talk about the Eshack incident, is that correct?

A Yes, sir.

Q Upon that discussion with Mr. Edwards, what did you do next?

A We took an oral statement from Mr. Edwards.

Q By oral, do you mean a statement that's not recorded?

A Yes, sir.

Q Upon the conclusion of that oral statement, what did you do?

A At that time the Prosecutor's Office was notified. Mr. John Shoemaker, Summit County Prosecutor's Office, and Mr. Zuch arrived at the Police Station. We filled them in on the conversation that we had with both men and Mr. Shoemaker and I went back into Interrogation Room 9, and Mr. Shoemaker took a recorded statement of what Floyd Edwards had said.

Q You were present during that recorded statement?

A Yes, sir.

Q At the conclusion of that recorded statement, what did you do next?

A After the recorded statement was taken from Mr. Edwards, we then went to Mr. Haywood Manning and took a recorded statement from him also.

Q Who took the recorded statement of Mr. Manning?

was State's Exhibit 12, or the envelope that contained or is around State's Exhibit 12, when did you transport that? At the very same time, sir.

A At the very same time, sir.

Q I hand you now an envelope that has been marked State's Exhibit 10. Could you look at that and identify that, please?

A This is the envelope that contained the shell casing that was found at the scene, 223 Wooster Avenue. It was transported at the same time -- the slug, gun and magazine, to B.C.I. -- four items were taken at the same time.

Q Did you have occasion to return those items from B.C.I.? Yes, sir.

Q Do you recall when that was?

A January 28, I picked them up at the B.C.I. Lab and returned them to our Police Property Room.

Q I'm going to play the recording. Officer, I'm about ready to play a cassette tape which is inserted in a tape player. The cassette tape has been marked State's Exhibit No. 2. I'd like you to listen to this tape and see if you can identify this tape, please.

"Speaking is Assistant County Prosecutor John Shoemaker. It's now about 20 minutes after 8:00 o'clock in the evening. I'm located here in the Akron Detective Bureau, the 6th Floor, Interrogation Room No. 9. Present

Is that the one we played yesterday?

MR. ZUCH: No.

(tape playing)

--Ten P.M. on January the 9th, 1974 - 75. Present here with me -- I am mixing up the dates. Present here with me is Det. Harold Craig of the Akron Police Department, and I believe it is Mr. Harold Manning, is that correct?

A Hayward.

Q Hayward Manning. And Mr. Floyd Edwards, is that correct?

A Uh huh.

Q Now, Mr. Edwards, I have already given you your miranda rights, is that correct?

A Uh huh.

Q You will have to speak up a little bit.

A Yeah.

Q Okay, and just again I am going to go through these because we are making a new tape. Do you understand that you have the right to remain silent?

A Yes.

Q And anything that you say can be used against you in a court of law. Do you understand that? Is that answer yes or no, sir?

A Yes.

Q Okay, you have a right to have a lawyer present with you before you talk to us. Do you understand that?

Q Well, are you afraid that if he knows that you say that he's got the gun, that he would hurt you?

Q You mean just talk about it, yeah, I don't know if he would hurt me or not. I don't know that for sure. I don't think that he would.

Q You don't know?

A I wouldn't say that he would though.

Q Okay. It is now twenty-five minutes of eleven on January 9, 1975. And this concludes the second tape and the second statement taken from Mr. Edwards on this matter." (Whereupon, the tape is turned off.)

By Mr. Rudgers:

Q Detective, that statement that you just heard played on the recorder, does that truly and accurately represent the statement that you participated in on January 9, 1975?

A Yes, sir.

Q Now, there's evidence that there was a statement, recorded statement taken earlier by Loyd Edwards. Could you tell the jury why this second statement was taken?

A Well, the first statement it was found that there was something happened to the machine or recorder, and some footage of the tape was destroyed or erased or something, so we took -- the reason we took the second statement was to cover the points covered in that first one that were.

Q But he was arrested at five thirty in the evening and at three o'clock in the morning you are still talking to him, isn't that a fact?

A At approximately two thirty we had him identify the gun.

Q Let me ask you something else. Based upon your investigation, not what somebody else might have told you, was there any articles stolen from that Comet Tool on December 28th at 5:30 in the evening, without suppositions or assumptions?

A Will you repeat that again?

Q Based upon your knowledge, not based on assumptions, not based on presumptions, to your knowledge what articles were taken prior to or as result of your investigation on December 28th when you investigated the tragedy of Mr. Eshack? Not what Mr. Edwards told you but based upon your other investigation?

A Sixty-five dollars.

Q All right, sixty-five dollars.

A Yes, sir.

Q You know that, or somebody told you?

A That's what we were told.

Q Okay. That's what you were told, but you don't know that, do you? Yes or no?

A No.

Q No fingerprints on the wallet?

This tape is being started at 460 feet on side one of State's Exhibit 3. I would like you to listen to this tape and see if you can identify it.

A (Nods head.)

Q Is that a yes?

A Yes.

Q Thank you.

(Whereupon, the tape recorder is now playing:)

"Q Speaking is Assistant County Prosecutor John Shoemaker. I am located here on the sixth floor of the Akron Detective Bureau about quarter of three A.M. on January 10, 1975. Present here with me again is Mr. Floyd Edwards, and Mr. Edwards, I have already explained your rights to you, and I am going to go through this one more time because I am going to ask you about this firearm that I have in front of me. You got a light? Now, Mr. Edwards do you have -- do you understand that you have the right to remain silent?

A Yes.

Q Is that yes?

A Yes.

Q Do you understand that anything that you say could be used against you in a court of law?

A Yes.

on the tape?

A I don't know whether it's on the tape.

Q What you really are telling me and telling the jury, there's several things he told you that aren't on tape?

A Yes, sure. Some things he didn't want to put on tape.

Q Shoemaker didn't?

A No, Floyd.

Q You let Floyd decide what you're going to put on the tape, is that right?

A Well—

Q Or is the truth of the matter—

A I didn't say that.

Q You got him to admit what he might have done. Later on you called Shoemaker. Shoemaker gave him the rights after it's too late to deny it.

MR. RUDGERS: Object.

A That's wrong.

Q That's wrong?

A Yes.

Q You admit talking to him, or your partner admits talking to him, don't you?

A That's right.

Q Prior to Shoemaker and implicating himself on the tape recording?

A That's right.

A I don't remember.

Q He could have told you that?

A Well, if I don't remember, he could have. Maybe he didn't, I don't know. .

Q Do you remember, and can you generally say there's a lot of things that he told you that aren't recorded?

A Yes, sir. I would say so.

Q Sure. And isn't it a fact that you or Mr. Shoemaker or Mr. Zuch or Mr. Cross only put on tape the things that they wanted somebody else to hear?

A No, sir.

Q No, sir? But you didn't put everything on?

A No, sir. Well, we had a tape recorder. You can't just make a person say something. They just say what they want to say.

Q All right. But when you go in to talk with a boy that's being charged with aggravated murder, when you go in and talk to him, you might expect he's going to reply and respond to you, right? And you tell this boy that anything he says may be used against him--

MR. ZUCH: Wait. Ought to have an answer.

COURT: Let him answer the question.

MR. CHUPARKOFF: I'm sorry.

A I have an awful lot of them who don't reply.

Q But in this case this boy was talking to you?

COURT: Just asking for his opinion.

Q You believe some parts but you didn't believe other parts?

A Yes.

Q As result of what he told you, did you arrest Stanford Harris, yes or no?

A Yes.

Q And as result of what he told you, did you charge Stanford Harris with the crime?

A Yes, sir.

Q You believed him because you arrested Stanford Harris upon what he told you?

A On the advice of the Prosecutor, yes.

Q Well, as a trained police officer, trained in investigation, did you arrest Stanford Harris based upon the statement that Mr. Edwards told you?

A He implicated Stanford Harris. We arrested him. Right.

Q Charged him with the same crime?

A Right.

Q What happened to Stanford Harris in this case?

A We released him.

Q Okay. Do you think in that aspect Floyd Edwards wasn't telling the truth or you don't know which?

A There were several reasons why Mr. Harris was released.

Q Well, let's see. Did you release him because you didn't think Floyd Edwards was telling the truth?

A We released him because we couldn't find any direct evidence to hold him.

Q So you're not saying that you don't know whether he's involved or not; you just couldn't find any direct evidence, right?

A Right. Couldn't connect him with the crime.

Q Okay. When Floyd Edwards first talked to you before you recorded his voice, it was after you talked to Hayward Manning for about an hour, right?

A That's true.

Q As result of your investigation, Officer, were you able to determine whether or not Floyd Edwards allegedly was drinking prior to the alleged escapade?

A There was no report of him drinking. No.

Q Okay. Did you in fact ever ask him what he was doing prior to walking down the street, or wouldn't that be important to you?

A He gave us a statement that he was with his friend, Hayward Manning, his girlfriend Anita Watson; they were at Manning's home. They drove down to the laundromat; from the laundromat he walked to Wooster Avenue. There was never any mention of his condition at the time.

Q And you didn't ask?

A No, sir.

Q And you don't know if anybody asked? 77

MR. ZUCH: Nothing else.

COURT: With the exception of that one reservation--

MR. CHUPARKOFF: I want to do one more thing, Your Honor. Mr. Zuch has marked the envelopes as exhibits. There's also writing on the envelopes. I would respectfully let the physical evidence go in, not the envelopes.

COURT: Yes.

MR. CHUPARKOFF: I would ask the court reporter to mark the exhibit with the same number as on the envelope. Just so long as the envelopes and notations don't go in. That's no evidence.

MR. ZUCH: Whatever way you want to do.

COURT: Anything else?

MR. CHUPARKOFF: You rest this case?

MR. ZUCH: Yes.

STATE RESTS

MR. CHUPARKOFF: Your Honor, we move for a directed verdict on the armed robbery charge, and we move for a directed verdict on both the specifications.

COURT: Overruled.

MR. CHUPARKOFF: Your Honor, if it please the

COURT: They are not denying they received it.

MR. CHUPARKOFF: There's a comment in writing.

I don't want that on there.

MR. ZUCH: Why don't you put the Defendant's list in.

COURT: Showing the list you received.

MR. ZUCH: This is for the purpose of this motion. Mark this as Joint Exhibit.

(Joint Exhibit 1, Letter, is marked for identification.)

MR. ZUCH: A letter dated March 3, 1975, to Mr. Theodore Chuparkoff from James A. Rudgers is marked as Court's Exhibit No. 1 for the purpose of this motion; and I have a carbon copy or photostat of a letter sent to Mr. Chuparkoff. This is a carbon copy that went to Mr. Parke. It will be marked Joint Exhibit 2. That is dated January 29, 1975.

(Joint Exhibit 2, Letter, is marked for identification.)

MR. ZUCH: This is a letter dated January 29, 1975 and is two pages from John H. Shoemaker. This letter is not signed since it is a carbon copy.

MR. CHUPARKOFF: We acknowledge we received it.

MR. ZUCH: These exhibits also, I assume, can be used by the Defendant to indicate we did not put on our witness list, by inadvertence, Patrolman Ron Davis,

committing or attempting to commit aggravated robbery.

I have used the word "purposely" or "purpose". Purpose to kill is an essential element of the crime of aggravated murder. A person acts purposely when it's his specific intention to cause a certain result.

It must be established in this case that at the time in question there was present in the mind of the defendant a specific intent to kill Joseph Eshack, Jr.

Now, purpose is the decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

The purpose with which a person does an act is known only to himself unless he expresses it to another or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means and method and the weapon used, and all other facts and circumstances in evidence.

If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill must be inferred from the use of said weapon. Both an inference of intent to kill and an inference of malice may be inferred from the facts and circumstances of an unlawful killing where a deadly weapon

writing to the Court.)

* * * * *

(The Attorneys are present with the Court) (Zuch and Parke)

COURT: The jury has asked me to repeat the relationship between aggravated murder and the specifications as to their obligation in regard to both.

Everybody is present in the courtroom and I'd like to perhaps go over with both of you exactly what I should say.

MR. ZUCH: I think that you should say they have to determine the facts. Their obligation is to determine the facts as they relate to the specification.

COURT: Yes. What else? Anything else? How about you, Chuck? What do you think I should tell them in relation to what Fred has said?

MR. PARKS: I think that you could re-read a portion of your charge relating to that. It would be permissible.

COURT: Well, you see what you're doing then is reading it out of context. That's the danger of that. I think if you two could agree on a statement -- I'll do what you fellows want me to do.

MR. ZUCH: I think the relationship of the specification to the aggravated murder is not their consideration. Their consideration is to determine

specifications.

COURT: Yes.

MR. CHUPARKOFF: It's in my judgment after consulting with Mr. Parke and my client, Mr. Edwards — Mr. Edwards relies upon my judgment, although we have made our exceptions and timely objections in this trial, that we would object to any further instructions to the jury.

COURT: You think that's fair to your client?

MR. CHUPARKOFF: It's my judgment, and Mr. Parke's judgment.

COURT: I'm not questioning that. I think, when you made that decision, you think this is fair?

MR. CHUPARKOFF: In the best interest of our client.

COURT: The State's position?

MR. ZUCH: The State agrees with whatever the wishes are of the defendant and his Counsel.

COURT: Then we will not. I will so instruct the jury.

MR. CHUPARKOFF: Thank you, Your Honor.

* * * * *

COURT: They want the tape recorder. Do you want them brought back in here or run it in the jury room?

venue is not proven, then this Court has no authority to listen or you as jurors to decide this case.

If you find beyond a reasonable doubt each and every element of aggravated murder and return a verdict of guilty, it is your duty to deliberate further and decide the additional factual question which I have read to you, Specification 1 and Specification 2.

And as to these two specifications, if you arrive at that particular consideration in your deliberation you must decide each and every element of these or any one of these specifications beyond a reasonable doubt.

In the event in your deliberation you find that the State of Ohio has not proved beyond a reasonable doubt Specification 1, or Specification 2, or Specifications 1 and 2, and you find through your deliberation that the State has failed to prove aggravated murder as stated in Count 1, then and only then you will consider a lesser included offense, that lesser included offense being involuntary manslaughter.

The Court wants to say to you if the evidence warrants it, you may find the defendant guilty of a crime lesser than that charged in the indictment. However, notwithstanding this right it is your duty to accept the law as given to you by this Court and if the facts and the

prejudicial error to repeat it again, among other things.

COURT: For the record, they have said that nobody can remember what the specifications say. That's all they want done. Don't want any explanation, just what it says. That's all.

MR. CHUPARKOFF: But for the record, I am sure they don't remember the total charge the Court gave them anyhow. In all of the experience that I have, it's very difficult to remember the total charge. Now, the Court has read the indictment.

MR. ZUCH: The State concurs in just reading the specifications.

COURT: Just the specifications. They don't know what the language of the specifications says.

MR. CHUPARKOFF: Object. But go ahead.

COURT: Let the record reflect that the defendant has been present all the while.

(WHEREUPON, at the door of the jury room, with all parties in hearing distance.)

COURT: As I understand it, you have asked me to read Specifications 1 and 2, is that correct?

JURY FOREMAN: Yes.

COURT: It says here: Specification 1: That said offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the defendant, to-wit, aggravated

robbery. That's Specification No. 1.

Specification 2 says: That the offense presented above, the killing of Joseph Eshack, Jr., was committed while the said defendant was committing or attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery.

MR. CHUPARKOFF: Note our objection. For the record, I want to again make sure that the record indicates Counsel for the Defendant objects to the Court answering any request by the jury to read the specifications.

MR. ZUCH: For the record, solely the specifications were read, not the charge.

MR. CHUPARKOFF: I want to make the point in view of the fact that the indictment is not evidence. The only reason why we are here is very prejudicial because unless in fact you read the whole charge, you are emphasizing a particular part of it.

Does the record reflect that about 5:30 the jury had a question to the Court, and reconvened at 7:30 and the Court asked Defense Counsel whether or not we would concur in answering the question for the jury. And the Defense Counsel refused.

MR. ZUCH: Let's bring them in.

MR. PARKE: Why? Does it have to be run in
the presence of the defendant?

COURT: I never do anything without the
defendant being present. It's his case. He's going to
hear everything going on.

MR. CHUPARKOFF: Couldn't we get another
cassette and transpose whatever is on that, then give
it to the jury?

COURT: They'll only play it once.

MR. PARKE: Your Honor, I have done that.

MR. CHUPARKOFF: He has a tape recording of
just the confession. He does.

MR. ZUCH: I don't know how clear it is.

COURT: Where is it? Do you have it?

MR. PARKE: I have the tape, yes.

MR. CHUPARKOFF: You have the cassette.

COURT: Do you want it set up there or out
here?

MR. ZUCH: Out here.

(WHEREUPON, at 7:55 P.M., the jury are brought
into the courtroom.)

COURT: For the record, You are requesting
that the statement of the defendant be played back again
in its entirety, is that correct?

COURT: Let's proceed, Gentlemen.

MR. CHUPARKOFF: Your Honor, if it please the Court, in view of the fact this is mitigation, the Defendant goes first? What's the procedure?

COURT: The Court would prefer that you go first. The Court has to be convinced by the preponderance of the evidence in relation to the mitigation, of three grounds of mitigation. And the Court is going to allow you all the leeway necessary.

MR. CHUPARKOFF: Of course, the Defendant has the burden of going forward, is that correct?

COURT: Correct.

MR. CHUPARKOFF: Your Honor, if it pleases the Court, so that the Court can follow the evidence, we expect at this hearing to prove by the preponderance of the evidence that my client, Floyd Edwards, suffers from a mental deficiency and we think, Your Honor, that the evidence will prove that because of his mental deficiency he could not have been required to exercise that degree of judgment that a normal typical person might be required to exercise. And for that reason, Your Honor, I think the Court will ultimately spare Mr. Edwards from the electric chair.

COURT: All who are going to testify in this case, would you take a seat inside the rail.

the smaller the number, the further away he is compared to this average I.Q. of what, 93 to 100?

A A smaller number places him in a different classification yes.

Q All right. If his I.Q. — a person of Floyd Edwards' age and training and background, was 85, how would you classify him?

A Dull-normal.

Q Sorry?

A Dull-normal.

Q Dull-normal?

A Yes.

Q And if his I.Q. was 80, what would you classify him?

A Dull-normal.

Q All right. If it was 79?

A Borderline.

Q Borderline to what? Do you mean borderline on insanity or what?

A Borderline to what is termed in some cases mental deficiency.

Q If it was 79, you say?

A Uh huh.

Q How about if it was 75?

A Borderline.

Q And what was Floyd Edwards' I.Q.?

A Floyd Edwards' Full-Scale I.Q. was 76.

Q When you say Full Scale I.Q. that throws me a little bit.

I don't know what you mean by Full Scale?

A Full Scale includes Performance Scale and Verbal Scale.

Q So then you come up with two scores, is that right?

A Yes.

Q What was his Verbal I.Q.?

A His Verbal Score was 40. I don't have his I.Q.

Q And what was his Performance Score?

A 29.

Q And from those you cannot tell me—

A Yes, I can. Verbal I.Q. 81; Performance I.Q. 72.

Q Well, then how would you classify the 72 I.Q. of Floyd Edwards on the performance portion of the test?

A I don't believe you can classify one portion of the I.Q. to total I.Q., which is the total valuations made.

Q But anyhow you are indicating, of course, that the result of your examination, his I.Q. was what?

A Which I.Q. are you speaking of?

Q Well, I'll strike the question. After examining Floyd Edwards, what do you say his I.Q. is?

A From the scores we obtained on the test it is 76.

Q And what is the average I.Q. that you would expect a normal, average, intelligent individual, his age, and whatever factors you would consider in evaluating Floyd

could read at, not necessarily reflect I.Q.

Q Not necessarily?

A Yes.

Q Might?

A Yes.

Q You might even get a lower level than 76; you might get 72 or 68, isn't that true?

A No. That's not true.

Q Would you say that based upon your test, that Floyd Edwards is lacking in a mental capacity?

A According to the—

Q Yes or no?

A Yes.

MR. ZUCH: Your Honor, this is his witness.

MR. CHUPARKOFF: Not my witness.

COURT: That's all right. You can cross examine him.

By Mr. Chuparkoff:

Q Well, then if Floyd Edwards is lacking in mental capacity, which you have just said yes, you agree to; then obviously that means that he is deficient in mental capacity, isn't that true?

A No, sir.

Q All right. But if you are deficient in something, no matter what it is, isn't that a synonym for the word

"lack" and if you say it's not a synonym for the word "lack," tell me the difference between being deficient and being lacking?

A A person can lack something from 100%. A person with an I.Q. of 120, lacks something that a person with an I.Q. of 180 has, but it doesn't mean he's deficient.

Q Just a minute. Okay, Mr. Reinhold, the Court will have to make that determination. You have indicated to me that Floyd Edwards is lacking in mental capacity?

A Yes.

Q We are not asking the degrees that he's lacking. Right? Now, if he's lacking in mental capacity, I want to substitute the word "deficiency" for "lacking." I tell you they are synonyms. Therefore, if lacking in mental deficiency, he is deficient in mental capacity -- not degrees now, but isn't that a fact? You will agree with that, won't you?

A I won't agree. I can't agree.

Q You do agree he's lacking in mental capacity?

A Yes.

Q Do you agree he lacks the capacity to compete in the normal, average stream of intelligence on a day-to-day basis?

A No, I don't believe that.

Q You don't believe that? You indicated that he had an

Q You don't? Isn't it a fact that despite the fact that you show an I.Q. of 72 or 76, it could fluctuate a couple of points?

A Yes, sir.

Q And that 72 could really be 70?

A Yes, sir.

Q It might even be 69? There's no hard, fast rule, right?

A Yes.

Q Despite the fact that you show Floyd Edwards with an I.Q. of 76, you readily admit he could have an I.Q. of 74 or less; 72 or 70, isn't that right?

A Could be.

MR. CHUPARKOFF: I have nothing else.

COURT: You may inquire.

CROSS EXAMINATION BY MR. RUDGERS:

Q Mr. Reinhold, you submitted a report to the Court based on your examination of Floyd Edwards relative to the Wechsler Adult Intelligence Scale, is that correct?

A Yes.

Q Do you have a copy of that?

A Right here.

Q I ask you to refer to it, if you could? On the first page at the bottom, you indicated the Verbal I.Q. was 81 and the Performance I.Q. 72. Do you average those to reach

of academic stimulation and school success." Explain that?

A Low Scores were Information, Arithmetic Sub-tests, which indicates he might not have had sufficient contact with the school experience.

Q So again that would indicate that those sub-tests that he scored low in were related to things that he might have learned in school as opposed to common sense and ability to reason?

A Yes.

Q Now, the term "mental deficiency" has been used, Mr. Reinholt, and the term "mental retardation." When you administer an intelligence test you cannot -- isn't it a fact you cannot determine solely from that test whether someone is mentally deficient or not?

A The overall performance we cannot say mentally deficient;
have to go by the I.Q. legally.

Q You say the I.Q. Score of 76 does not indicate in any way whatsoever that the person would be mentally deficient?

A Not necessarily.

Q Other factors would come into play, such as interviews or other tests that might be administered, projective tests, anything like that, the person's background, things like that, is that correct?

A Yes.

Q You're telling me this can change?

A It can fluctuate either way.

Q Fine. It can change?

A Either way, yes.

Q But these can never change?

A I didn't say that.

Q They could change?

A Could change, but we are talking about the overall I.Q.

Q I understand that. This can change. It can go up and it can go down. Right?

A Right.

Q You are telling me to go into Apple Creek you can have a 68 I.Q. and that makes you mentally retarded in the State of Ohio, isn't that true?

A Mentally deficient.

Q The upper limit for placement in State Institution for the Mentally Retarded is 68. Is that your language?

A Yes, sir.

Q You still stand by that?

A Yes.

Q Then at 68 you can be considered mentally retarded and placed in an institution?

A You can be considered that, yes.

Q Fine. And this boy has 72. That score can go down a little bit?

A (Nods head.)

Q You are telling me he's borderline which means he's either above or below the line?

A Right.

Q You are going to tell me this boy does not suffer from mental deficiency?

A Yes, sir.

Q We are not trying to place the blame on why he's mentally deficient, if he is, or why he got a poor education, if he did. You indicated a part of his mental capacity might be the result of his environment? Is that not true?

A In part, yes.

Q Okay. Do you know about his environment?

A In part, what he told me.

Q All right. In other words, his environment which evidently from whatever— strike that. Tell us about his environment?

A Well, he was brought up — his father died and he was sent out of the home. He lived by himself while he went to school. He was in a slow-learners class at school. He found it difficult to attend school because he had to get up every morning, but he did manage to go to school. He worked as a dishwasher and various other things.

Q Needed money for food?

A No. They have stated on here, "mentally disqualified;
not qualified for induction."

Q In other words, the military records of the United States Government indicate that after Floyd Edwards took a mental examination to get into the military, the United States Government said he was mentally not qualified, is that correct?

A Right.

Q You say he got a score of 3?

A Yes.

Q Do you know what score is required to get into the military?

A At one time it was a 10.

Q Are there any other comments on his records with reference to his mental capacity or his mental knowledge?

A No. There's nothing else in here.

MR. CHUPARKOFF: I have nothing else. Thank you.

CROSS EXAMINATION BY MR. ZUCH:

Q Mrs. Berthelot?

A Right.

Q Could I look at the records one second that you were referring to? Where's the test score indicated?

Did you indicate that Mr. Edwards did not pass the

physical examination or that he did?

A No. He passed the physical.

Q And he failed the mental examination?

A Right.

Q Do you know whether the mental examination was given orally or in writing?

A I believe it was given in writing.

Q So it would be safe to assume that you would have to be able to read and write to pass that examination?

A Right.

MR. ZUCH: Thank you. I have no further questions.

MR. CHUPARKOFF: I would, Your Honor, want to mark -- get a copy of this because I don't think we need the original. This is an exact copy of his records, is that right?

A Uh huh. I haven't checked them, so I don't know what's inside.

MR. ZUCH: As long as she says that's the official record, that's fine with me.

MR. CHUPARKOFF: Your Honor, can we have somebody run a copy of this off?

MR. ZUCH: Your Honor, may I ask one more question?

and overseeing of the two classrooms at the Juvenile Court.

Q Have you on occasion taught school at Juvenile Court?

A For the last seven years.

Q In that capacity did you have occasion to tutor or teach Floyd Edwards?

A Yes.

Q You know Floyd Edwards?

A Yes.

Q What year was it that you in some fashion taught Floyd Edwards?

A 1971.

Q For how long a period of time?

A I think it was almost two months. I'm not really sure.

Q You, of course, remember Floyd Edwards?

A Yes, I do.

Q Do you have a file of some of his work in your possession or would it be in Mr. Liggins' possession?

A Mr. Liggins had it.

(Defendant's Exhibit B, file on Floyd Edwards, is marked.)

Q Mrs. Verde, I have a file that's just been given to me by Jasper Liggins which I understand may contain some work and some results--

A Uh huh.

Q Tell us if you had any difficulty trying to tutor or teach Floyd Edwards and what was his capacity to learn?

A Floyd was a very proud young man and he would not admit that he had any problems. When I tested him on the Wide Range Achievement Test he scored 2nd grade 4th month in reading ability.

Q I don't know what that means?

A That means if he were — well, it means that he is reading on a second grade level.

Q In 1971?

A Yes, and he was a junior, I think, at South High at that time.

Q Again, he was a junior at South High, in your judgment based upon the test he was reading at second grade level?

A That's right.

Q That's not normal, is it?

A No.

Q What else?

A He was the kind of young man who would like all of the textbooks that he normally used in school. At Juvenile Court we try to work on the young person's level, and it was very difficult for him. I think at the time he was taking biology. It was very difficult for him to read the textbook. He couldn't understand it, but he wanted to have the books right there so that he perhaps could

prove to himself that--

Q He tried to convince himself that he was intelligent?

A That he was working on his own grade level. He hated
to admit that perhaps he had some problems. He knew it
but he didn't want anyone else to know it.

Q Did you give him any other test?

A No. That's the only one I gave him.

Q Were there any other tests in his file that you know of?

A Not that I know of.

Q Based upon the two months that you taught Floyd Edwards,
would you say that he had normal, average intelligence or
he was lacking in normal, average intelligence?

MR. RUDGERS: Object.

COURT: Sustained.

Q Do you have an opinion whether or not he had the capacity
to learn at his grade level?

MR. RUDGERS: Object again.

COURT: Sustained.

Q Was he able to do junior work in high school?

A No.

Q You're saying he has difficulty in reading?

A Right.

Q Do you have an opinion whether he had difficulty in
understanding you in the use of words? For instance, if
I said to Floyd Edwards, do you want to waive your rights

do you have an opinion as to whether he would be able to understand what I meant by that?

A He wouldn't understand that, no.

Q The word "waive" would be too big for him?

MR. RUDGERS: Object.

COURT: Sustained.

MR. CHUPARKOFF: Am I permitted to ask her if she has an opinion of mental deficiency?

COURT: You didn't qualify her as to being an expert. The only thing she can testify, she's a teacher. She can tell what they did and the relationship at school, how he responded at the school, and things of that nature.

Q Mrs. Verde, I think you have in the file copies of some of his work, do you not?

A Yes.

Q Pull them out and give them to me.

(Defendant's Exhibits C thru F, Papers, are marked.)

Q Mrs. Verde, I have marked some exhibits as Defendant's Exhibits C, D, E, and F, just for the purpose of identification. I ask you to look at these and tell me what they are?

A They are examples of English themes. Usually we have a topic on the board every day, and there is some discussion and then the young person is requested to write a paper

A Right. That gives me an idea what I can expect of him.

Q What was the extent of your formal education?

A I have a Bachelor's Degree from Akron University.

Q Majoring in what?

A Elementary Education.

Q You have been at the Juvenile Center seven years?

A Yes.

Q Was Floyd, based upon his mental capacity — whatever
that is — typical of the average student you would
expect at his age?

A No.

Q When you say he wasn't typical, was he above normal or
below normal?

A Below.
→

Q Would you classify him as a slow learner or in the
regular category?

A Slow learner.

MR. CHUPARKOFF: I have nothing else. Thank you.

CROSS EXAMINATION BY MR. RUDGERS:

Q Mrs. Verde, did you say you administered the reading test to Floyd Edwards?

A Yes, I did.

Q You can vouch for their validity? You feel they were a

fair and accurate test of his reading ability?

A Yes.

Q He was a junior in high school?

A Yes.

Q How can you explain that? A person reads at second grade and he's a junior in high school?

A I think it's like so many times today, young people get caught; they get passed on from year to year to year and the basic reading ability was not there — probably not there any where along the line, from second grade.

Q That's the ability — that's the only ability you tested was his reading ability?

A No. I tested reading, math and spelling. The test was a short test to give us some idea of what they can do in those three areas.

Q It's not an intelligence test?

A No.

Q The papers that Mr. Chuparkoff had you examine, there are grades on there as "A" and "Very good"?

A Yes.

Q You indicated you don't take off for grammatical errors or spelling?

A No.

Q Those are based on his thoughts, mental processes?

A Yes.

Q And what he thought about things?

A Uh huh.

Q You thought his thoughts were very good?

A Uh huh.

Q That he could think well, is that correct?

A Yes. There's a lot of discussion that goes on before we write these.

Q What I am saying, the grade, the good grades he got on those were based on his ability to think and reason and come up with something you thought was logical and coherent and understandable?

A On those topics, yes.

Q Even though he might not be able to read?

A That's right.

MR. RUDGERS: I have nothing further.

REDIRECT EXAMINATION BY MR. CHUPARKOFF:

Q What kind of test score do you recall he got in math?

A As I recall, I think it was about second grade level also.

Seems to me all three of them were. If I could look?

Q You are allowed to look through there, yes, ma'am.

A I take that back. Reading score 2-4; spelling second grade 6; math fourth grade fourth month.

Q Fourth grade math, second grade reading and second grade spelling?

A Not always.

Q Not always?

A Yes.

Q How long did you spend with Floyd Edwards in examining him on the two times, approximately?

A Well, the first time was a little more than an hour,
and the second time was about a half hour.

Q And is it safe for me to say that the more time you spend evaluating somebody, the more accurate perhaps your diagnosis might be?

A Sometimes.

Q And as part of your examination is it important that you know the background of the person? What is important?

A Yes, sir. Everything is important, the background, any information that we can get regarding the recent past, his family background, and scholastic achievement as well.

Q In this case, before you examined him did you have a record or information with reference to his scholastic background? Was that furnished you?

A No. No, it was not.

Q Okay. If you had his scholastic background would that have assisted you?

A Yes, sir.

Q Did you have, by any chance, for your benefit the results of an I.Q. test that was given to him by Dr.

Reinhold, the Psychologist of Akron, Ohio? Did you have that information available, if you can remember?

COURT: You may refer to your notes.

Q You're allowed, Doctor, to look at anything you want?

A I don't remember what I have exactly. No, I didn't have any I.Q. Score before that time.

Q Well, did you have the I.Q. Score available at the time you drew your report?

A Yes.

Q You may refer to your report, if you desire, too. You may refer to anything you want in your file. Okay?

A Uh huh.

Q Was your knowledge of his I.Q. Score important to you in reaching your evaluation and diagnosis?

A Yes, sir.

Q What was the I.Q. given you?

A The I.Q. that was given to me was Full Scale of 76.

Q All right, Doctor, is that average, above average, or below average?

A Well, this is so-called borderline mental deficiency or retardation, according to the Diagnostic Manual here of the American Psychiatric Association.

Q Again, are you then telling me it was below average?

A Below average, yes.

Q What is average I.Q.?

A Is between 87 and 110.

Q Between 87 and 110?

A Right.

Q And his was 76, which was below average?

A Right. This is called borderline mental deficiency.

Q Borderline mental deficiency? Doctor, would somebody -- or would Floyd Edwards, based on your examination and based upon all the things that you know, based upon your formal education and your training in medicine, do you have an opinion whether Floyd Edwards would be able to formulate the same good judgment or the same judgment that a person of an average I.Q. would be able to formulate and form? Do you have an opinion?

A Yes. Depends on the type of judgment that you're talking about. In general, yes, he could.

Q How about other--

A In certain areas he could be less able to.

Q To form that kind of judgment?

A Right, especially under stress.

Q Under stress he could not be expected to form the same good judgment as somebody with a normal I.Q.?

A Yes.

Q Doctor, I am looking at a copy of your medical report to the Court and I am looking at the next to the last paragraph and in it you say that -- or do you say? Do

A You are right.

Q If you have a low I.Q., it has a tendency to affect your ability to have good judgment?

A You are right.

Q Then because of his low I.Q., it follows then he does not have the ability to exercise good judgment?

A You are right.

Q Now, incidentally I am not saying that Mr. Floyd Edwards is insane and I'm not saying he's mentally defective. I'm not trying to get you to say he don't know right from wrong, but I am trying to establish whether or ~~not~~ based upon your medical report and your examination ~~now~~ based upon your I.Q., whether this boy is mentally deficient? And you say he's borderline?

A Yes, sir.

MR. CHUPARKOFF: I have nothing else.

CROSS EXAMINATION BY MR. RUDGERS:

Q Doctor, could you start off by giving the Court your definition of mentally deficient?

A Okay. I will refer primarily to the so-called DSM-II which is the latest edition of this Diagnostic and Statistical Manual of Mental Disorders made by the American Psychiatric Association. According to it, mental retardation--

Q By the way now, you used the word retardation rather than deficiency. One point of clarification, when you refer to mental retardation, you are referring to mental deficiency? Those words are interchangeable as you understand them in common terminology among Psychiatrists?

A Yes, like synonyms. "Refers to subnormal general intellectual functioning which originates during the developmental period and is associated with impairment of either learning and social adjustment or maturation, or both." This is a general definition.

Q That's the definition you use to guide you in your evaluations of Floyd Edwards, is that correct?

A Yes.

Q Now, your conclusion you have already stated, and that is that Mr. Edwards is not mentally deficient, is that correct?

A He is borderline.

Q And you used the I.Q. Score as part of your -- one of the tools in making this determination, is that correct?

A Yes.

Q And you also reviewed both his history and his prior background, his experiences as they were related to you through Mr. Reinhold's reports and the other reports that you observed?

A Yes, sir.

a recessive factor.

Q Do the genes have something to do with the person's ability to comprehend or does his mind?

A Part of it is genes.. It's a recessive trait that is transmitted.

Q Transmitted?

A Yes, in a recessive way. Now, how it's transmitted usually is by generations, and here we have the family's social-economic factors and environment inference in the genes, in the great-grandparents.

Q I think the question I was really trying to direct to you was -- if a person is a slow learner, does that give you some opinion or some idea of his mentality?

A Yes. Yes.

Q Now, if you have two people in school and one is not a slow learner and one is a slow learner, do you come to the conclusion that the one who is a slow learner suffers from some kind of mental deficiency? Now, forgetting about the book and the definitions, he does suffer from mental deficiency, isn't that true?

A Yes, mental deficiency for learning, right.

Q Well, but mentally deficient, isn't that true?

MR. RUDGERS: I'm going to object. It's been asked and answered.

A It's according--

COURT: You have answered.

A We are talking about learning capacity.

Q Well, does a person's capacity to learn have any affect upon -- does his mind have any affect upon a person's capacity to learn? Your brain is your motor, is it not?

A Yes, sir.

Q And people with a high I.Q. are considered to be brains because it's the brain length and the mind that make them be as intelligent as they are, is that not true?

A Yes, sir.

Q A person who is a slow learner has a mental problem.

I'm not saying he's insane. He's lacking something,
is he not?

A Yes, you are right.

Q He's deficient in something?

A Right.

Q He's deficient mentally?

A You are right.

Q And so, therefore, if Floyd Edwards was a slow learner
and that was a fact, you got to come to the conclusion
he's mentally deficient, right?

A Yes. Yes, I say yes.

Q You are telling me that he borders on being mentally retarded, is that what you're telling me?

A For the worse.

Q If it does it for the worse, then that would affect his ability to function in our society, would it not?

A In some respects, yes. This is why they developed so-called -- following the I.Q. test, they do have vocational testing because you cannot put anyone under this group, borderline, in college because it would be a waste of time.

Q Not college material?

A Right.

Q It would affect his ability to function in our society?

A Yes, sir.

— MR. CHUPARKOFF: I have nothing else. Thank you, Your Honor. Thank you very much, Doctor.

MR. RUDGERS: Nothing else.

COURT: You may step down.

(Witness excused)

* * * * *

A Yes.

Q When would that have been?

A Well, Floyd was in the eleventh and twelfth grades at South.

Q You have the records which are available to you as Counselor?

A Yes.

Q You have the actual record?

A I have the Permanent Record Card. Once a student graduates, certain parts of the record are destroyed and the Permanent Record Card is retained.

Q You have the Permanent Record Card?

A Yes.

Q What are the things that are on your card that I asked you to bring to court today?

A On the card is included information about Floyd from Grade 7 through graduation in regard to the marks he received in various classes that he was in, his attendance, some I.Q. scores from 1960 and 1964, his address.

Q In 1960 he had an I.Q. score?

A Yes, February 8, 1960 he was tested.

Q What was his I.Q. then?

A According to this it was 74.

Q And in 1966 you took it again?

A In October, 1964, it is recorded as 70.

Q His I.Q. was 70?

A That's right.

Q And do you have a list of the accomplishments that he made in different subjects there as to the grades?

A Yes, I have the marks that he made in his classes. Right.

Q What are the marks he made? Strike that question. How many graduated in Floyd's class?

A There were 188 students graduating that year.

Q Did Floyd graduate?

A Yes, he did.

Q Does it show how he ranked?

A Yes, it does.

Q How did he rank?

A He ranked 187th out of those 188 students.

Q He was next to the last?

A That's right.

Q Was that based upon achievement, grade achievement?

A It's based upon grade point average from his grades received and various classes throughout grades 9 through 12.

Q Give us what grades he received?

A Well, for his first three years of high school he was graded as all students are, on the scale from A, B, C, D and F; and then there's an additional grade that is sometimes used, called a "P." The "P" stands for passing.

In the 9th grade Floyd received almost entirely all "P's," indicating that the teacher felt that Floyd was working hard, that he was trying to do what was requested of him but that he had difficulty in meeting the requirements. He also received a few "F's" that year; and in the following years, in the 10th and 11th grades, he received primarily "D's" which is a passing grade, the lowest passing grade possible. In his senior year the grading system was switched for Special Education students, classified as slow learners, to a "Satisfactory" and "Unsatisfactory" mark; and that year Floyd received all Satisfactory marks except for "F" in Physical Education.

Q Does that mean that he was satisfactorily completing the course achievement-wise or that he was working up to his ability?

A That means that in the judgment of his teacher he was working up to his capability, and in her judgment--

MR. RUDGERS: Object to all of this hearsay.

COURT: Yes.

Q Does the card indicate whether Floyd was a slow learner or not? Do you know that for a fact as to whether Floyd Edwards was a slow learner at South High School?

A He was classified as "slow learner", yes.

Q Can you define that particular classification?

A When a student is referred for testing or if his teacher suspects that a student might be eligible for a slow-learning class, he is referred to the school psychologist who then performs the testing. When a student tests below the I.Q. of 80, he is eligible, and upon consent of his parents may be placed in what is commonly called EMR Classes.

Q Which is what?

A Educable Mentally Retarded.

Q He was classified as Educable Mentally Retarded?

A That is what we call that particular class, yes.

Q You are saying then that his records indicate that he didn't function as a normal student, is that true? Is that a safe statement?

A It's difficult to define "normal" but yes, I would agree with that.

Q I'll mark your record for the record, and then I have nothing else to ask you.

(Defendant's Exhibit G, School Record, is marked.)

CROSS EXAMINATION BY MR. RUDGERS:

Q Miss Becker, how long have you known Floyd Edwards?

A Maybe I should clarify something. I was not Floyd's Counselor, but I did know him while he was enrolled at

South, and I would say I knew him while he was there about two years.

Q Did you ever counsel him?

A I talked with him on a casual basis.

Q Did you ever counsel him? Yes or no?

A No.

Q You just knew him casually as a student in the school?

A Yes.

Q When was he put in the slow learner class?

A May I see the record again. The first indication of it on this card was in the 8th grade in 1968.

Q In 1968?

A That's what this card indicates.

Q Well, is it a fact that's when he was put in slow learning classes or not?

A I can't attest to that.

Q He graduated from Akron Public School System?

A That's right.

Q He's a high school graduate?

A He is.

Q Is that correct?

A He's considered to be a high school graduate, yes.

Q Mr. Chuparkoff asked you what a "Passing" grade meant and you gave a definition. You don't know for a fact that what you stated was why he was given a "P", do you?

practicing Psychiatry?

A I began practice in 1957.

Q Would you give us briefly your educational background?

A I attended Ohio State University, graduated from the Medical School, interned at Columbus State Hospital, had residency training at Columbus State Hospital and at the V.A. Hospital in Baltimore. I then was employed at the Summit County Receiving Hospital, and finally went into private practice in 1957.

Q Been practicing psychiatry ever since?

A Yes, sir.

Q At the request of this Court did you have occasion to examine one Floyd Edwards?

A Yes, I did.

Q What was the purpose of that examination?

A To determine whether or not he was suffering from mental illness or psychosis and/or mental deficiency.

Q Doctor, would you give us your explanation or your definition of mental deficiency?

A Mental deficiency is the ability to learn with support and also to be able to obey simple commands and to be able to make somewhat adequate adjustment to society.

Q Would you explain the nature of your examination and the duration of your examination with Mr. Edwards?

A The duration was about one to one and a half hours. I

conducted the interview in the jail whereby I attempted to get the defendant to answer questions in relation to the crime which he had been charged, but he attempted to control the situation and manipulate it by avoiding discussion of the events by deliberately trying to concentrate on his past history and education, and so forth.

Q Would it be fair to say that he wasn't successful in manipulating the situation?

A He was fairly successful. It took about an hour and a half, therefore it was only within the last 10 minutes or 15 minutes that I was able to get him to tell me anything about the events that occurred for which he had been charged.

Q He was successful in manipulating you from the area you wanted to inquire in?

A Yes, sir.

Q Based on that examination and at that particular time were you aware of the defendant's intellectual capacity or did you have any information concerning his intellectual capacity?

A Other than the psychologist, Mr. Reinhold, had examined him before, several days before, and thought too that he was of average intelligence.

Q At that point you thought he was of average intelligence?

A Yes, sir.

Q Concerning any reports subsequent to that time that were submitted to you by me, did you learn any different information or any different status of the defendant Floyd Edwards' mental capacity?

A Yes, sir. Yes, I learned that, I believe his full scale I.Q. was 76, which would place him in the borderline range of intelligence.

Q Then we are talking about the intellectual quotient or the I.Q. which evaluates his learning ability?

A Right, numerical evaluation.

Q Does the I.Q. correspond -- is there a direct correlation between I.Q. and mental deficiency?

A Is there a direct correlation? To a degree, yes, but I.Q. is merely one facet of the overall picture of mental deficiency.

Q One component in making the determination by your definition of mental deficiency?

A Yes, sir.

Q Is that a fair statement?

A Yes, sir.

Q Do you have an opinion based on the examination that you conducted -- the examination I am referring to is the personal interview that you conducted -- based on the information available to you, that I supplied to you

A Yes, sir.

Q And in 15 minutes you passed judgment on Floyd Edwards?

A No. Excuse me. It took approximately about a half-hour.

Q All right. One-half hour you were able to pass judgment on Floyd Edwards and you did write a report and draw a conclusion?

A Not necessarily so. It was based on the whole hour and a half, not just the half-hour. The half-hour just concentrated on the incident itself.

Q All right. But because he tried to manipulate you, you came to the conclusion that he was not suffering from any mental deficiency, is that right, Doctor?

A Yes.

Q Based upon that fact alone?

A Based on that fact alone, no. I took that in consideration.

Q Doctor, nevertheless you took it upon yourself to write a medical report drawing to the conclusion that he was not suffering from mental deficiency, right? And until yesterday you thought you were correct?

A I still do.

Q All right. Would it have helped you to know at the time you were examining him what his I.Q. was?

A Perhaps. I think I would have taken that a little more into consideration.

Q They are correlated?

A Yes, to a degree.

Q If correlated, that tells me they are related?

A To a degree.

Q All right. Forgetting about the degree for the moment.

MR. ZUCH: Your Honor, forget? That's part of his answer. It's part of his answer.

Q All right. To a degree, if they are correlated and they are related to a degree, then the I.Q. has to be significant?

A The I.Q. is significant.

Q Yet, when you passed judgment on it, you didn't even know what his I.Q. was?

A Numerical I.Q., no.

Q Despite the fact it was significant?

A True, but that again is only a numerical figure. We go by the overall clinical picture, not just by a figure given to you.

Q What overall clinical picture did you go by in the hour and a half?

A When I asked him to repeat questions, he seemed to be annoyed; became somewhat, almost belligerent and would appear to be aggravated by my asking him to repeat any questions. This took primarily the first part of the interview.

Q In other words, you are basing your whole result today on what Mr. Zuch told you yesterday?

A No, sir. I am basing it on what I found on February 5th, sir.

Q All right. But since Mr. Zuch told you something yesterday you have changed your opinion slightly as to his intelligence?

MR. ZUCH: Your Honor, for the record I have submitted all the available reports that we had to Dr. Migdal yesterday, so it's not a question of who's telling who what. It's reports that are part of the court's record.

MR. CHUPARKOFF: Based upon information that became available to you on Monday, April 28, you have now changed your opinion, at least as to his average intelligence, have you not, Dr. Migdal?

A As to his average intelligence, yes. It's now approximately one group lower.

Q I know you're very busy. I appreciate your being here. Before you got some information yesterday, after your examination, based upon all of your training in psychiatry, you came to the conclusion Floyd Edwards was of average intelligence?

A Yes, sir.

Q Now, you did that based upon an hour and a half interview

COURT: Go ahead. Put a question.

Q Based upon Dr. Reinhold's report that you have in your possession which indicates that Mr. Edwards has an I.Q. of 76, you have changed your opinion today with reference to whether or not Floyd Edwards is of average intelligence or not, true?

A It's slightly lower than what I thought it would be.

Q No, Doctor, yes or no?

A Yes.

Q You changed your opinion?

A (Nods head.)

Q Are you telling the Court that you were wrong in your first evaluation of his average intelligence?

A I overestimated it.

Q Were you wrong or were you right in your judgment?

COURT: Give me some credit for having intelligence when listening to the answer. I can come to my own conclusion. I'm not a jury and have to be spoon-fed.

Q All right. Now, what do you say his intelligence is? Borderline?

A Possibly borderline; little bit below the average intelligence.

Q Since you formulated an opinion based somewhat on this number 76, Mr. Reinhold gave you, what is the average

I.Q. that you would consider to be average?

A What is the average I.Q. that I would consider?

Q That is, that number range?

A For average?

Q Yes?

A From about 90 to 100 or 110.

Q That's about average?

A Uh huh.

Q What would you classify somebody with an 85 I.Q.?

A It's again on the fringe. That's on the borderline.

Q Eighty-five is on the borderline?

A Yes.

Q What would you consider 90?

A Borderline? I think it's 68 to 85 is borderline.

Q Borderline what?

A Borderline mental retardation.

Q Now, you are indicating that an I.Q. of 68 to 85 is borderline mental retardation?

A Right.

Q You are telling me that's not average; that's below average?

A That's below average.

Q Am I to assume Floyd Edwards is below average mentally based upon the numbers?

A Based upon the numbers alone, yes.

below average mentality?

MR. ZUCH: Object; either mentality or intelligence quotient?

MR. CHUPARKOFF: Mentality we're talking about now, Your Honor.

COURT: Can you answer the question, Doctor?

A No, sir. I can't because it's just--

COURT: All right. You can't answer the question.

Q Does the I.Q. have any indication to you in psychiatry about a man's mental capacity to learn?

A You take that in consideration, but it's the overall picture that you see.

Q I don't want to argue; just talking about that as applying to Floyd Edwards?

A That fact alone?

Q That fact alone?

A Yes, it would indicate he was borderline intelligence, right.

Q Wait. Would the fact that a person is between 68 and 85 -- the person is 76 -- would that indicate to you that he was below average mentality, yes or no?

A Yes.

Q Now, if Floyd Edwards has 76, which is below 85, it follows that he is below average mentality, yes or no,

MR. ZUCH: Your Honor, I'll at least object to that for the record. I question whether we're talking about I.Q.? He interchanges the word.

COURT: What does it mean to you, Doctor? What does that last question mean to you?

A Based entirely on the numerical intelligence quotient, not necessarily the overall mental intelligence of the individual.

MR. ZUCH: Thank you.

Q Based upon some numbers, they are a guide to you. You indicated they are correlated, they are related, they are significant. You have indicated that 68 to 85 is borderline retardation, isn't that right?

A Yes.

Q You are telling me if you looked at somebody's I.Q., 68 to 72, you would formulate an opinion based upon the book that he's borderline mentally retarded?

A No, sir. I would take that into consideration. I would not base it entirely on that figure alone.

Q Okay. Is it safe to assume that somebody who has an I.Q. between 68 and 85 in your judgment is below normal mentally, below the average mentality?

A Yes.

Q And if Floyd Edwards has a 76, could I assume he has

consulted and discussed a particular case; and Floyd Edwards stood out because of certain things. First, he was a slow learner and Miss Verde at times draws on my experience in that particular field to enable her to carry on and plan a program.

Q What are some of the things that made him stand out?

A Well, to me one of the things that stood out was that he was extremely defensive about revealing what he thought of himself. In other words, I'm going to use a word and I don't mean to offend Floyd, but there was one thing. This happens very often, incidentally. We put on a front; we try to protect ourselves by not revealing some of our faults or what we think to be faults and the impression I got was that Floyd was trying to cover up for his own mental retardation; to use a more common word, and I don't mean offensively, his own stupidity. He was, I think, painfully aware that he was not like other people.

Now, Miss Verde said something about being tenth grade level, whatever it was; but the thing that stood out in my mind was that he wanted his tenth grade books on his desk. Now, I heard him read, and for all practical purposes, I wouldn't call him literate. In other words, he could read some signs; he could read second grade material. Perhaps if stretched a little

bit, he could comprehend something on the third grade level. I don't think he could read every word, but he was a very poor reader; but he didn't want others to know it, so he would have the other textbooks and pretend he was capable of mastering them. Now, he knew what many of us do not know. He was incapable of learning in the same manner, same extent as others.

Another thing that stood out, Floyd was very strongly motivated. Now, what happens very often when a child is unsuccessful in school he may stop trying to learn. He will give up. We will find some kids will say I just can't learn, I'm too dumb. In doing that, a person then quits trying. Our major objectives as teachers is to motivate the child to learn. See. He already had it. I don't know what his previous experience was, but he never lost the desire to learn, but here he stood out. This is one reason I remember him. It's unusual to find someone strongly motivated.

It was the army tests he was preparing for. I knew when he was preparing for the army. It was a waste of time just based on his knowledge of reading and the math and spelling. He didn't stand a chance. We couldn't discourage him, you know, miracles do happen; but based on 25 years, I could have said forget about it. That wasn't my responsibility there, because there are

MR. RUDGERS: Object, unresponsive.

COURT: I see you're on your feet, Mr. Rudgers. You have to talk to teachers in relation to slow learners.

Q Just answer the question, Mr. Nurches. The question was, based upon your experience teaching Floyd Edwards and all the other expenses and training you have, do you have an opinion whether or not Floyd Edwards lacked the capacity to learn?

A He lacked the capacity to learn, very obvious.

MR. CHUPARKOFF: I have nothing else.

COURT: You may inquire.

CROSS EXAMINATION BY MR. RUDGERS:

Q Mr. Nurches, you said you never taught Floyd, is that correct? Isn't that what you told Mr. Chuparkoff? Just yes or no?

A No.

Q You never taught him?

A Yes and no.

Q You did teach him?

COURT: What does that mean?

A Okay. I will tell you. Every Friday we have movies, educational movies. I do the lecturing and conduct the discussion. We combine our classes, and Floyd was part

trying as hard as he could to do whatever I asked him to do.

Q If I can use the word, would you say he was a model inhabitant of the Juvenile Center?

A I don't recall Floyd having any problem there whatsoever. We do have weekly evaluation sheets and if I recall correctly, all of his were very positive, very positive.

Q Was there any factor, or did you have any opportunity to work with Floyd to try to get him into the army?

A Yes, I did. I have an Army Classification Manual I use with my boys. They have several tests, pass tests that they use as a sample of what the Army test is like. I would go over with Floyd daily, and I wasn't surprised that he could not retain from one day to the next what he learned or tried to learn, and because of that he did score very poorly on the exam.

Q Are you telling us you tried to tutor him to try to pass the military exam?

A For weeks.

Q For how long a period did you try to tutor him?

A I would say five, six, seven weeks.

Q After Floyd left the Detention Center, did you ever have contact with him?

A Quite often; quite often.

Q What were the circumstances?

A We have a file card on Floyd Edwards.

Q Before I ask you any questions in that direction, why would a student be referred to your department?

A Essentially for learning difficulties or for behavioral difficulties.

Q All right. And in your Department, I understand you have a record which indicates that Floyd Edwards was referred to your Department?

A On at least two occasions.

Q I have asked you to bring some records, have I not?

A Yes, you have.

Q I take it you really don't know Floyd Edwards?

A I have never seen him before, to my knowledge.

Q I understand it's the policy of the school system to destroy some records when a student reaches 21 years of age, is that correct?

A Yes, in the Child Study Department we destroy all the folders of youngsters 21 and over. We keep minimal records on youngsters who score fairly low on intelligence tests because the Social Security Department can obtain some money for youngsters when they become adults if they are mentally defective. So we keep a card on just these youngsters.

Q Youngsters who are mentally defective?

A Yes.

Q In that connection does the school have one on Floyd Edwards?

A Yes, we do have a card on Floyd.

Q You brought that card, did you not?

A Yes, I did.

Q You may refer to the card and tell the Court what information is on the card?

A His name, his birthdate, case number, he was seen by Mr. Robert Giebenrath, one of the Staff Psychologists, on February 8, 1960. He was given--

COURT: What year?

A February 8, 1960, by Mr. Robert Giebenrath, one of the Staff Psychologists. The Stanford Binet, Form L, was administered.

Q What is that?

A This is an intelligence test.

Q Go ahead.

A At the time he was 6 years 2 months of age and his mental age was approximately 4 years and 7 months, which resulted in an I.Q. of approximately 74. He was seen a second time on October 1, 1964, again by Mr. Robert Giebenrath; again the Stanford Binet was given. This time it was a Revision -- Form LN. This time Floyd was 10 years 9 months of age; his mental age was 7-6, which is 7 years 6 months and his I.Q. was 70.

considerably below the average range.

Q Would that be related or co-related to mentality in any fashion, Mr. Kirt?

A Well, when you're talking about I.Q., you're talking about intelligence. You are talking about mentality.

Q You are?

A Definitely.

Q And what does low I.Q. tell you about a person's mentality, if anything?

A Low I.Q. means he has less than average ability to learn.

Q All right. Does that mean he has less than average mentality?

A Yes.

Q And then if Floyd Edwards has a 76, and you have indicated that's in your range, can you say in your opinion he has a lack of mentality, he suffers from a lack of mentality?

A No. I responded to that earlier. He has a mentality to learn. It's diminished.

Q I understand.

A There's not lack of mentality. As I recall the question, he does not have lack of mentality; he has mentality. It's limited.

Q He has limited mentality?

A Right.

Q Is it safe — maybe playing on words -- he has limited

mentality, does that mean his mentality is deficient?

A I can't answer that in terms of the difficulty with
"deficiency" we've had up to this time. It's not well
defined.

COURT: He cannot answer that question, he said.

MR. CHUPARKOFF: I have nothing else. Thank you.

COURT: You may inquire.

CROSS EXAMINATION BY MR. RUDGERS:

Q Doctor, people in Special Education Classes, educable mentally retarded people, they graduate and leave school and function in our society, do they not?

A We have classes where youngsters can go through the EMR Program in through high school and do graduate.

Q In your experience they function normally in society -- normally, based on their capabilities?

A Some do; some don't.

Q Floyd Edwards was referred for learning difficulties, I would take it, at six years old?

A I can't say he specifically was referred for learning disability.

Q You have no opinion, I take it, as to his mental capacity?

A Only on the basis of the test scores I have here, and

COURT: Is there anything the Defendant has to say as to why judgment should not be pronounced in this case?

MR. CHUPARKOFF: Do you wish to say something, Mr. Edwards?

DEFENDANT: Yes.

MR. CHUPARKOFF: You may stand up and say it.

DEFENDANT: Mr. Barbuto, I'd like to say I'm sorry. Whatever you choose to do, that is what the Man above decide for you to do.

MR. CHUPARKOFF: Also, for the record he does say he is sorry for what happened.

COURT: The Court has reviewed all the testimony pertaining to mitigation; has reviewed the reports as well as the statement made by the witnesses that appeared on his behalf; the Court has read the Pre-Sentence Report. The Court, in reviewing the case finds that the preponderance of the evidence does not in this particular case, as far as mitigation is concerned the Court found that the aggravated murder of Joseph Eshack was not the product of the offender's psychosis or mental deficiency, and therefore finds no mitigation to consider in this particular case.

Needless to say, the Court was affected by the background of this boy, or this man I should say,

living under the conditions that he had to live and responding the way he responded through all the conditions and the Court was sympathetic in that regard, but the Court in fair conscience could not find that there was mitigation in this case.

The Court appreciates the fact that a lot of his friends who worked with him throughout the years came and spoke on his behalf, but again the mitigation, the preponderance was not there and the Court felt that you, Mr. Chuparkoff, have done an excellent job in presenting his side of the case, both during the trial and through the mitigation. The Court knows the burden that was placed upon you, as well as the State.

Now, it's my duty to sentence Mr. Edwards. It's the sentence of the law and judgment of this Court that you be taken hence to the Summit County Jail, and there safely kept, and that within 30 days to be conveyed by the Sheriff of Summit County to the Penitentiary; and within their walls and within the enclosure prepared for that purpose, and under the direction of the Warden, you will be put to death on September 1, 1975, having a current of electricity, sufficient intensity to cause the death, to pass through your body, as provided by the statutes of the State of Ohio for the crime of Aggravated Murder of one Joseph Eshack. May God forgive you for

Supreme Court of the United States

No. A-753

FLOYD EDWARDS,

Petitioner,

v.

OHIO

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),
IT IS ORDERED that the time for filing a petition for writ of certiorari in
the above-entitled cause be, and the same is hereby, extended to and including
May 28, 1977

/s/ Potter Stewart

Associate Justice of the Supreme
Court of the United States

Dated this 16th
day of March, 1977.

FILED
COURT OF COMMON PLEAS
JAN 28 1975
Summit Co., Ohio
JOHN PODA JR., Clerk of Courts

January 28, 1975

Dr. Elliot Migdal
Second National Building
Akron, Ohio 44308

Re: State of Ohio vs. Floyd Edwards
Case No. 75-1-52

Dear Dr. Migdal:

Enclosed is a copy of the Court's order appointing you to examine Floyd Edwards as to his mental condition.

The one question to be considered in this case at this point is whether or not the Defendant has a mental deficiency.

As required by Ohio law, examination is to be made by a psychiatrist and a written report of his findings as to the mental condition of this man shall be made to the Court. Your report and/or testimony is for the purpose of aiding the Court in making its determination as to the Defendant's mental capacity. (ORC 2929.03 D and 2947.06).

To assist you in formulating the wording of your written report to the Court, please be advised that the legal definition of "mental deficiency" is as follows:

"Is whether or not the offense was primarily the product of the offender's (Floyd Edwards) psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." (ORC 2929.04 (B)3).

Dr. Migdal
Re: Floyd Edwards

Page 2

If I can be of any assistance in providing you with background information concerning the nature of the crime Mr. Edwards is alleged to have committed, please do not hesitate to contact me and I will be happy to review my file with you.

Please address your written report to me.

Very truly yours,

James V. Barbuto
Judge, Court of Common Pleas

cc: Judge
John Shoemaker, Prosecutor's Office
Theodore Chuparkoff
Charles D. Parke
Dan Reinholt

THE STATE OF OHIO
Summit County et al:

COURT OF COMMON PLEAS
FEB 4 1975
Summit Co., Ohio
JOHN FORD JR., Clerk of Courts

COURT OF COMMON PLEAS

JANUARY Term 1975

THE STATE OF OHIO

vs.

FLOYD EDWARDS

No. CR 75/1/52

JOURNAL ENTRY

THIS DAY, to-wit: The 27th day of January, A.D., 1975, upon due consideration of the Court, IT IS HEREBY ORDERED that the Defendant herein, FLOYD EDWARDS, be examined by Dr. Elliot Migdal in the Summit County Jail on Wednesday, February 5, 1975 at 3:00 p.m.

APPROVED:
January 27, 1975

John H. Shoemaker
JOHN H. SHOEMAKER
Assistant Prosecuting Attorney

etc.

James Barbuto
JAMES V. BARBUTO, Judge
Common Pleas Court
Summit County, Ohio

cc: Booking Desk
Dr. E. Migdal

FILED
COURT OF COMMON PLEAS
FEB 13 1975
Summit Co., Ohio
JOHN PODA JR., Clerk of Courts

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO

) CASE NO. CR 75 1 52

Plaintiff

ASSIGNED TO JUDGE BARBUTO

vs.

) MOTION TO RESTRICT USE

FLOYD EDWARDS

) OF PSYCHIATRIC REPORT

Defendant

)

Now comes the defendant and moves that the report of the psychiatric examination of Floyd Edwards by Dr. Elliot Migdal be made available only to his counsel, Theodore Chuparkoff and Charles D. Parke, unless and until defendant has been found guilty of the crime of aggravated murder.

Defendant says that this Court does not have authority to make a psychiatric examination of defendant prior to conviction, and that such a report would be prejudicial to the rights of the defendant if it is made available to the Prosecutor and to the Court. The statements made by defendant to the psychiatrist would be prejudicial if such information is revealed to the Prosecutor and to the Court.

Theodore Chuparkoff

Charles D. Parke
Attorneys for Defendant

Certification

I hereby certify that copy of the foregoing motion was sent to John H. Shoemaker, Assistant County Prosecutor, by ordinary mail this day of February, 1975.

Charles D. Parke

HERSHEY & BROWNE
ATTORNEYS AT LAW
1000 FIRST NATIONAL TOWER
AKRON, OHIO 44308
(312) 354-1180

ELLIOT MIGDAL, M. D.
SECOND NATIONAL BUILDING
AKRON, OHIO 44308
TELEPHONE 635-3065

FILED
COURT OF COMMON PLEAS

FEB 27 1975

Summit Co., Ohio
JAMES B. McCARTHY, Clerk of Courts

February 25, 1975

Hon. James Barbuto, Judge
Court of Common Pleas
Summit County Courthouse
Akron, Ohio 44308

Re: EDWARDS, Floyd
Journal Entry No. 75-1-52

Dear Judge Barbuto:

This is to certify that I saw Mr. Floyd Edwards in psychiatric consultation on Wednesday, February 5, 1975 in the Summit County Jail. The psychiatric examination was requested in order to evaluate the patient's mental and emotional status in order to aid the Court in making its determination as to the patient's mental capacity following his being charged with Aggravated Murder of one Joseph Eshack.

Mr. Edwards was seen for 1½ hours in the Summit County Jail. The reason for this lengthy interview was due to the fact that the patient refused for more than the first half of the examination to answer any and all questions concerning the offense for which he had been charged. He became somewhat loud, aggressive and verbally abusive, claiming that he had already answered the questions not only to the police, but also similar questions to a psychologist who had interviewed him a few days before.

As an attempt was made to proceed with the interview, Mr. Edwards spoke quite rapidly to the point that some words were garbled and could not be understood. He became somewhat belligerent when asked to repeat them. Thus the interview was conducted under extreme pressure due to the patient's attempt to manipulate and control the situation throughout the entire interview. Thus it seemed to this examiner that the patient was making a deliberate attempt to avoid discussion of his present offense by going off on tangents regarding his past history. Primarily this concerned his relationship to his parents, his education and past offenses. In regard to the latter, Mr. Edwards stated that this was his first offense as an adult. He made mention of the fact that there have been several charges brought against him as a juvenile but skinned over the details stating that they merely dealt with his relationship to his mother. He then recited how he had been abandoned by his mother and other siblings, living in their home for four weeks without the benefit of heat, light and water. He spoke proudly of how he was able to live like this, claiming

FILED
COURT OF COMMON PLEAS

FEB 27 1975

Summit Co., Ohio
DANIEL R. McCARTHY, Clerk of Courts

Page 2
Re: EDWARDS, Floyd

that he wanted charity from no one. He went on to state how he had gotten a room at the YMCA where he remained in his room most of the time except for occasionally going to the T.V. room. He was evicted for non-payment of rent. He seemed proud of the fact that he would find very unconventional, remote places to live such as in the basement of various houses in the Edgewood Avenue housing project. He stated that his last place of employment was with the Stewart-Calhoun Funeral Home in various capacities. He also mentioned that he had graduated from South High School and although he did not fail any grades, he felt that he was merely promoted each year without being deserving of it.

It was at this point that the examiner took a more direct approach with the patient stating that he had only remotely referred to the crime. Practically at the termination of the interview, he agreed to cooperate and discuss the events that led to his incarceration. Nevertheless, he was given an extra half-hour to review the events that had taken place if he would cooperate, which he proceeded to do in a haphazard sort of manner, again becoming involved in details that were somewhat irrelevant.

Discussing the events that led to his incarceration, Mr. Edwards began by stating that on December 20, 1974, he, his girlfriend and her brother, Maywood, went to a laundromat about 6:00 P.M. He claimed that he had consumed a "nickle plug of pot (marijuana)", "some beans (TLC pills)" and Wild Irish Wine. In addition, he had some beer. He did not mention being "high" on pills as such, but had thought of getting money to buy further supplies. Since he did not have any money of his own, he knew that he would have to resort to some means of getting some in order to afford his expensive vice. Leaving the laundromat alone, he went down Campbell Street where he met Stanford Harris, a friend of his, who is approximately his age. Together they proceeded to Wooster Avenue to the store of a used parts dealer, one Joseph Eshack, in order to get the money he wanted. The store was closed but they knocked on the door which was finally opened by Mr. Eshack. The patient then asked the proprietor for various kinds of tools but finally did ask him for his money after Harris had given him the gun. He claimed that the victim then came at him with the wire cutters, and when he swung at the patient, he (Edwards) grabbed his arm after Eshack had cut him superficially with the wire cutters. He added that Eshack tripped but in doing so pinned him on the floor. The patient managed to get away, rolling out from underneath the proprietor after Stanford had gotten on top of the victim. However, in doing so, Harris managed to put his hand on top of the patient's hand, which he claimed was on the handle of the gun but not on the trigger. Thus by the process of elimination since his finger was not on the trigger, he admitted that Stanford must have shot the storekeeper. He could not bring himself to state openly who pulled the trigger, but yet deliberately tried to lead one to believe that he did not fire the gun. Likewise, he does not state that Stanford shot

FILED
COURT OF COMMON PLEAS

FEB 20 1975

Page 3
Re: EDWARDS, Floyd

Summit Co., Ohio
BAMES & McCARTHY, Clerk of Courts

the victim, but implied that he must have shot him since his (Edwards) finger was not on the trigger. Likewise, he avoids mentioning whether or not it was accidental or intentional.

Following this incident, they took the money, left and walked down Wooster Avenue. Prior to separating, however, the patient indicated that Stanford accused him of shooting Eshack which the patient vehemently denied. Nothing further was said about this matter until he was picked up for questioning as a result of a telephone tip to the police. The patient went on to state that he was certain that Stanford's friends had told on him and accused Harris of making a deal with the prosecutor, naming Edwards as the assailant. He accused Harris of getting off on a lesser charge by cooperating with the prosecutor. He knew this to be a fact because Harris told him so while both were waiting to be arraigned. In summation, therefore, the patient not only implied that Harris pulled the trigger, but also deliberately implicated the patient of being the assailant when he made "a deal" with the prosecutor.

From a psychiatric standpoint the patient spoke quite rapidly, showed pressure of speech which at times was incoherent and irrelevant. When asked to repeat certain responses, he would become quite enraged. His affect was one of extreme hostility and suspicion as he glared menacingly at the examiner, particularly at the onset of the interview. Some evidence of hostility remained throughout the examination. Often he would evade or avoid certain replies, but at times would become boastful or arrogant. He appeared to be of average intelligence. He showed no remorse for any of his actions and it was only by implication that he intimidated his friend. He admitted that the robbery was predetermined but not the murder of which he was innocent since he did not pull the trigger. Throughout the interview he appeared to be demanding, manipulating control of the situation or else he would not cooperate. At times he would seem dramatic, then aggressive, demanding and suspicious but totally callous and without conscience.

In essence, there was no evidence of a psychosis, thought disorder, mental disease or mental deficiency to be present. Therefore, the diagnosis best befitting this individual that would encompass the above characteristics or symptomatology is that of an Antisocial Personality, formerly Psychopathic Personality Disorder. Essentially, he can be considered competent and responsible for his actions, being entirely free from psychosis, mental disease or deficiency.

I trust that this will provide you with the information you need regarding my psychiatric evaluation of the mental and emotional status of Mr. Floyd Edwards.

Very truly yours,

Elliot Migdal
Elliot Migdal, M. D.

EM/jms

INTER-OFFICE MEMO

From Daniel ReinholdDATE January 22, 1975RE: Floyd EDWARDS--Page OneDate of Birth: 12/4/53Date of Interview: 1/21/75

Floyd is a black male who is average in height and has a rather slender build. He was very articulate throughout the interview and cooperated until the point he felt he could not divulge more information about the particular crime for which he is accused. His reaction was realistic, and he did cooperate after no further questions were asked concerning the alleged offense.

Floyd said he was born in Akron, Ohio and has lived here all his life. He was eleven years old when his father died of cancer. He described his father as a nice man who cared about people, the family, and continued to provide food and clothing for the family. He did discipline the children occasionally by using the belt. Floyd remembered nothing in particular that he did with the father that was entertaining and did say that his father kept the family pretty close to home and in fact kept them in the backyard because he didn't think the children should bother the neighbors. He did play football and play catch with his father. He felt very badly when his father died.

Floyd said he remembered the night his father died, for his father was quite delirious and kept asking Floyd to come to his room. The father had been ill with cancer for about two years, for he stated the father had cancer of the lung but did not want a tracheotomy--thus, refused any operation to remove the cancerous growth.

The mother was a dishwasher. She was a very kind person, as described by Floyd. She did discipline as did the father. Floyd did very little with his mother except joke in the evenings and watch television. The father and the mother related well to each other, and Floyd could not remember any arguments.

Floyd stated that the mother changed after the father died. She became more strict and made him change his clothes after school, and he was not allowed the same freedom. The mother was strict because the father told the mother not to run around with other men and take good care of the children.

Floyd said that his mother got so strict to the point that he told her that she didn't have to buy him any more clothes or give him any more food. He began to go around the neighborhood and obtained jobs mowing lawns, washing walls, cleaning basements, and during the wintertime shoveling snow at his elementary school. When he earned money, he would bring it home and buy groceries with it and eat his food rather than his mother's food. His mother offered him her food, but he refused to take it unless he was very hungry. He did not wear the clothes his mother bought him and had very little clothes of his own. His brother did wear some of the clothes his mother bought for him, and Floyd said that this made him quite upset; although he didn't use the clothes.

Floyd said that he was put out of the home, and he lived in the Y.M.C.A. while he was going to high school. Floyd stated that he went home one day from high school and found that the mother had moved out of the home and only left in the home his bed and his clothes. He said he stayed in his home for two weeks and then began to sleep any place he could find

INTER-OFFICE MEMO

From Daniel Reinhold

DATE January 22, 1975

RE: Floyd EDWARDS—Page Two

to sleep. Finally he went to the "Y", and this was arranged through a counselor at South High School. He stayed there six months, and this was paid for by the Youth Services Bureau. Finally, he was told that the Youth Services Bureau could no longer pay his room; and he was then locked out of his room at the "Y", so he began to find places to stay. He said he doesn't have an address at this time and hasn't had one for quite a while. For example, he will go and stay with someone for the evening and then go and live and sleep in the basement of a local project where nobody can find him.

He feels he related well with his sisters, but he fought with his brother. On one occasion his brother used a knife and cut him a little in one of their scuffles.

Floyd went to Grace Elementary School, West Junior High School, and South Senior High School. He graduated from South. He always liked school, but he did not get good grades. He felt that he clowned around a great deal in school and paid very little attention to the teachers. He also stated that he was a slow learner. Floyd was expelled from school on several occasions for fighting, for not paying attention in school, and for talking back to the teachers. Floyd felt that he did not have many friends at school because he found it difficult to associate with other boys. He knew three women teachers he liked very much and remembered their names and felt they were very good to him. He had some difficulty in attending school; for while he was by himself, he found it difficult to get up in the morning and go to school. He was in no extracurricular activities.

After graduation from high school, Floyd worked as a dishwasher in the Tea House Inn for seven months. This was a part-time job, and he obtained it while he was still in school. He was released from this job because of a lack of work. He also had a job with a man who hauled scrap iron, and he had this job for about three years. After about three years, he began to dislike the hassling and teasing the truck driver did; so he left this job. Now he works part-time in a funeral home. This is only for a two- or three-hour period every day.

I asked Floyd about the crime for which he is accused, and he said he is accused of aggravated murder and aggravated robbery on Wooster Avenue. A proprietor of a store was shot during a holdup attempt. Floyd was arrested on a telephone tip to the police. Floyd did admit that he and another man went to rob the store, for Floyd was looking for money to buy drugs. While in the store, there was a scuffle; and the other man accidentally fell on Floyd's gun which discharged and shot the proprietor of the store. After the shooting, both left the store. The other man has been released because of insufficient evidence. Floyd did not know what evidence they had against him.

Floyd said this was his first adult offense. He's had some juvenile offenses including running away from home or at least some domestic difficulties with his mother, but nothing serious.

Floyd stated that he smokes about two to three packs of cigarettes a day. He drinks when he has the money. He has smoked pot and does use some drugs. He was eighteen when he had his first sexual experience but now has only infrequent sexual relations because he doesn't have any friend with whom to have sex.

SUMMIT COUNTY PROBATION DEPARTMENT
INTER-OFFICE MEMO

To _____
From Daniel Reinhold

DATE January 22, 1975

RE: Floyd EDWARDS—Page Three

He was in the hospital once for a T and A operation but has had no serious illness. He said that his hobbies are working and being a mechanic or carpenter. He doesn't particularly care whether he's paid, but he always liked to have something to do.

If he could have three wishes, he'd like to get married to the sister of a friend of his. He would like to "get out of the mess"; and thirdly, he would like to have his own place to stay. If he had to be an animal, he'd choose to be a chimpanzee because that was the only animal he could think of.

I asked him what type of person he was, and he said he was the type that would help anybody. He does not feel he has a temper unless he is irritated.

Floyd seemed to be well oriented in all spheres and had good recall for both recent and remote events. No delusions or hallucinations were elicited, and he seemed to have adequate judgment and some insight into his own behavior. His affect was appropriate throughout the interview, and he displayed at least average intelligence.

Floyd appears to be an immature individual with some antisocial characteristics. His history, if true, indicated some motivation and has the desire to at least to attempt to cope with his environment. The court is requesting a psychiatric evaluation to determine the mental status of this man at the present time and to possibly obtain some insight into his current personality.

DR/pp

Court of Common Pleas

Summit County
Akron, Ohio 44308

James J. Barbato
Judge

March 11, 1975

Dr. Abdon Villalba
2341 Oakwood Drive
Cuyahoga Falls, Ohio

OPEN
In Re: State of Ohio
-vs-
FLOYD EDWARDS
Case Number: 75 1 52

Dear Dr. Villalba:

Enclosed is a copy of the Court's order appointing you to examine Floyd Edwards as to his mental condition.

The one question to be considered in this case at this point is whether or not the Defendant has a mental deficiency.

As required by Ohio law, examination is to be made by a psychiatrist and a written report of his findings as to the mental condition of this man shall be made to the Court. Your report and/or testimony is for the purpose of aiding the Court in making its determination as to the Defendant's mental capacity. (ORC 2929.03 D and 2947.06).

To assist you in formulating the wording of your written report to the Court, please be advised that the legal definition of "mental deficiency" is as follows:

"Is whether or not the offense was primarily the product of the offender's (Floyd Edwards) psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." (ORC 2929.04(B)(3)).

Dr. Abdon Villalba
Page two
March 11, 1975

If I can be of any assistance in providing you with background information concerning the nature of the crimes Mr. Edwards committed, please do not hesitate to contact me and I will be happy to review my file with you.

Please address your written report to me.

Very truly yours,

JAMES V. BARBUTO
Judge, Court of Common Pleas

cc: Judge
Frederic L. Zuch, Prosecutor's Office
Attorney Theodore Chuparkoff
Attorney Charles D. Parke
Dan Reinholt, Psycho-Diagnostic Clinic

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 35562

State of Ohio

APPEAL FROM

COMMON PLEAS

COURT

PLAINTIFF- APPELLEE

No. 19141 Cr.

-vs-

Howard Hudson

JOURNAL ENTRY

DEFENDANT- APPELLANT

DATE MAR 17 1977

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

This appeal follows defendant-appellant's (defendant), Howard Hudson's, conviction for aggravated murder and two counts of aggravated robbery. Defendant was sentenced to death by electrocution for ^{1/} the murder.

Decedent, Al Mismas, died as a result of a shotgun wound inflicted at the K. of C. Bar at 5719 Harvard Avenue, Cleveland, in the early morning hours of March 27, 1975. Overwhelming evidence was adduced by the State to show: (a) Defendant, with two other men, entered the bar

^{1/} Defendant was sentenced to 7 to 25 years imprisonment for each of the robbery counts, to run consecutively.

at approximately 1 a.m. on March 27, 1975 (Tr. 301-303); (b) one of the men announced that it was a holdup (Tr. 303, 317); (c) defendant was carrying a shotgun (Tr. 303, 317) and had a shotgun shell in his mouth (Tr. 317) (d) the bartender, who had gone down into the basement to place the cash in a safe (Tr. 277), returned to the bar and was met at the basement door by defendant who pointed the shotgun at the bartender and said that if the bartender moved he was "dead" (Tr. 278), and pushed the bartender towards the end of the bar (Tr. 281); (d) as defendant was pushing the bartender, decedent turned slightly around on his stool and was shot by defendant from a distance of 3 or 4 feet (Tr. 269, 282-283, 308-309, 321-322).
2/

During voir dire examination of prospective juror Robert Besch the following colloquy occurred:

"Q Well, can you set aside what you have read and the fact that there will be -- maybe -- some testimony that the crime occurred in a bar, the Knights of Columbus Hall and Bar immediately adjacent thereto, which is run by the Knights of Columbus. And there will be testimony from people, owners of the bar and people that frequent bars.

"Can you set aside the fact that they frequent taverns and may have a drink now and then and base your decision on this case if you are called upon as a juror in the case, based solely on the evidence that comes from their lips and their mouths on the incidents that occurred on this particular evening?

"A Well, I'll tell you. I'm extremely partial on anything that deals with alcohol and drugs. I have been that way from ground up.

"Q Well, are you saying, sir, that you cannot be fair and impartial then?

"A I would have to say, yes." (Tr. 110-111)

2/ Norbert Vaitekunas, a companion of defendant's, testified that when he was with defendant earlier that evening defendant and companion, Raymond Delagarza, discussed robbing someone (Tr. 218) after defendant and Delagarza picked up a shotgun from an unidentified man (Tr. 216-217). Defendant carried the gun (Tr. 218). Vaitekunas drops defendant and several companions at the 66 Tavern shortly before 1 a.m. (Tr. 219). The 66 Tavern is just down the block from the K. of C. Bar (Tr. 265, 275).

The court then examined Besch to further ascertain whether Besch could afford the defendant a fair trial (see Tr. 111-112). The colloquy concluded:

"MR. BESCH: I'm going to say that if a guy was drowning that I knew that was involved with drugs and I had the rope, I would be cutting it up.

"THE COURT: You would be what?

"MR. BESCH: * * * Cutting the rope up."

"THE COURT: Young man, I tell you we are going to excuse you but you just stay outside. We'll want to talk with you again, perhaps after the jury is selected in this case. You are not excused, you are just simply removed from the jury at this time." (Tr. 112-113)

Counsel for defendant then moved for a mistrial based on the statements of the prospective juror (Tr. 113). The court did not specifically rule on the motion and proceeded immediately to call the next prospective juror (see Tr. 113-11^{1/4}).

During the voir dire examination of prospective juror Rosemary Basile Miss Basile stated that she does not believe in violence (Tr. 120) and saw no reason for violence (Tr. 121). The court then questioned the prospective juror at length about her attitudes and her ability to act as a fair juror (see Tr. 121-123). Miss Basile answered that her attitudes on non-violence might affect her judgment as a juror (see Tr. 125). The following colloquy between the court and the prospective juror followed:

"THE COURT: How would you feel if something was to happen to you individually, wouldn't you want a fair trial?

"MISS BASILE: Yes. And if I was --

"THE COURT: If somebody had a feeling that they were very definitely against violence and then under that circumstance, even though they might be a fair person, you wouldn't want them to sit on your jury or if they had a strong feeling towards violence would you want them to sit and be your judge?

^{3/} We deem the court's conduct to mean that the motion was overruled.

"MISS BASILE: If I committed a violent act and somebody was sitting on a jury, supposedly of my peers, and said that they did not believe in violence and were non-violent, I would not want that person sitting on the jury for me.

"THE COURT: I see. Your feeling is, then, that nobody ever ought to be prosecuted if violence is part of the --

"MISS BASILE: I'm saying I don't feel quite qualified.

"THE COURT: --of the offense.

"MISS BASILE: "I don't feel qualified to sit in judgement [sic] of a person who committed a violent act. Because of how I feel on violence." (Tr. 125-126)

The prospective juror was challenged for cause by counsel for defendant (Tr. 126-127). The challenge was allowed and the court then stated to the dismissed juror:

"THE COURT: All right. Then, you may go outside and sit until we find time to discuss this with you." (Tr. 127)

At the conclusion of the trial the court charged the jury that defendant had the burden of proving intoxication by a preponderance of the evidence (Tr. 424-425). Where necessary, other facts will be discussed under relevant assignments of error.

4/
Defendant raises ten assignments of error. For reasons assessed below we find assignments four, five, and six well taken and the remainder without merit. We reverse and remand for a new trial.

Assignments of Error Nos. 1, 2, 3, 6:

- "1) Failure of the Court to instruct prospective jurors concerning highly prejudicial remarks made by one prospective juror in the presence of the others was error.
- "2) The Court erred in denying defense counsel's Motion for a Mistrial.

4/ Assignments of Error Nos. 7 through 10 were filed in a supplemental brief.

"3) Failure of the Court to grant Motion for Mistrial denied appellant's right to a fair and impartial trial in violation of the Due Process Clause."

* * *

"6) Due Process is violated when the Court reprimands a prospective juror, in the presence of the other jurors, for expressing an opinion which conflicts with the views held by the Court."

Assignments of Error Nos. 1, 2, 3, and 6 are considered together because they raise essentially the same issues.

The trial judge had a duty, during voir dire examination of prospective jurors, to ascertain whether a particular person examined qualified as a juror or was incapable of sitting as an impartial juror, see Crim. R. 24 (A)(9); see also ABA Standard on Trial by Jury §2.4.

The honest expression of opinion by prospective jurors during voir dire is not necessarily prejudicial to the defendant. Rather, where the specific opinion expressed by the prospective juror is of that quality that it is inherently prejudicial to defendant by virtue of the fact that other prospective jurors have heard the remark(s), there is an immediate duty on the part of the court to stop further interrogation, State v. Strong (1963), 119 Ohio App. 31, 34-35, cf. Irwin v. Dowd (1961), 366 U.S. 717, 722-723, 6 L.Ed. 2d 751, 756.

Here, prospective juror Besch merely expressed an opinion that in cases involving drugs or alcohol he could not be fair and impartial (Tr. 110-111). The court then posed several questions to Besch in an effort to ascertain whether Besch could put aside his attitudes and fairly evaluate evidence presented at trial (see Tr. 111-112). The prospective juror's remarks were expressions of the juror's attitudes on a general subject. The remarks did not specifically or inferentially implicate the defendant as did those remarks found to be prejudicial in State v. Str

supra at 37. ^{5/} Therefore, the court did not err in overruling the motion for mistrial, the potential juror's remarks did not preclude a fair trial, and the court was correct in not having given a special instruction to ^{6/} the remaining prospective jurors.

Assignments of Error Nos. 1, 2, and 3 are not well taken.

The issue raised by assignment of error six is somewhat different. Prospective juror Basile's comments (see Facts recital, infra, pp. 4-5) were harmless to defendant, but indicated her personal attitudes which might have precluded her ability to function as an impartial juror. The prospective juror expressed her concern for this very fact. The court properly inquired as to whether her attitudes did, in effect, block her ability to be impartial and fair. However, the content and context of the court's remarks (see Tr. 124-126) indicate the court's impatience and roughness with the prospective juror. Following the close and often tough interrogation by the court, counsel for defendant entered an objection for cause. The court's final remark to the dismissed prospective juror (Tr. 1) clearly implied that the court disapproved, or found distressing, her expression of honest opinion. The question raised here is whether the court's final remark, viewed in the context of the court's earlier interrogation, constituted a "chilling effect" upon other prospective jurors' likelihood to freely and honestly express their opinions and attitudes which they individually felt could preclude their impartiality.

5/ In Strong the prospective juror stated that, "This man, he killed two people . . . and a dog", supra at 33. It appears that the remarks were prejudicial by their implication of defendant's guilt. In the instant case, defendant's guilt was not raised. Only the general subject of the prospective juror's abhorrence of drugs and alcohol was discussed.

6/ If the remarks were prejudicial it clearly would have been innocuous if the court had given a "curative" instruction, see State v. Strong, supra at 36. Because the instant remarks were not prejudicial, the court's decision not to give any admonishment or instruction was not an abuse of discretion because the court prevented possible prejudice by not further emphasizing the nature of the juror's remarks.

We cannot say that the court's interrogation and final remarks did not "chill" the honesty and forthrightness of the remaining prospective jurors. In this case with the charge of aggravated murder, with defendant's life potentially at stake, it was error for the court to assume such a heavy-handed role in voir dire examination of prospective jurors that veniremen dismissed for cause are impliedly to be chastised for their honest expression of partiality and bias. While the error here does not reach the level of the error in the Strong case (and standing alone it would not be prejudicial), coupled with other facts in the trial, this error reaches the prejudicial stage. Under the circumstances we cannot say that defendant received a fair trial by twelve impartial jurors.

Assignment of Error No. 6 is well taken.

Assignments of Error Nos. 4 and 5:

- "4) The appellant was denied due process as a consequence of the State being relieved of its obligation to prove certain elements of the offense charged beyond a reasonable doubt.
- "5) The trial court erred in instructing the jury that the defendant had the burden of proving intoxication by a preponderance of the evidence."

The Ohio Supreme Court has recently held that Ohio Revised Code §2901.05(A) mandates that the burden of proof beyond a reasonable doubt rests with the State and the burden of proving affirmative defenses does not shift to the defendant. A defendant only has the burden of going forward with sufficient evidence to raise the issue. Once the issue is raised and goes to the jury for resolution, there is no occasion to discuss burden of proof in relation to the defendant. The State retains the burden of proving guilt beyond a reasonable doubt. It was, therefore, error for the trial court to instruct the jury that the defendant had the burden of proof of the affirmative defense, State v. Robinson (1976), 47 Ohio St. 2d 103, 110-113.

Here, defendant raised the defense of intoxication which is an affirmative defense in Ohio, State v. Robinson, supra at 108, and reaches intent, an element of the crime charged. The court erred prejudicially in instructing the jury that defendant had the burden of proving that defense by a preponderance of the evidence (Tr. 424-425), State v. Robinson, supra. Because Robinson was decided on statutory grounds and these assignments can be disposed of on the basis of the statute as interpretation in Robinson, we need not reach the broader constitutional questions raised by defendant with respect to the court's charge (see Defendant's Brief, pp. 9-12).

7/ Assignments of Error Nos. 4 and 5 are well taken.

Assignment of Error No. 7:

"7) That to the extent either that our death penalty statutes require, or the trial court found that the appellant had not proven the existence of facts in mitigation to avoid the imposition of the death penalty, the appellant was denied due process."

Defendant's argument is essentially that Mullaney v. Wilbur (1975), 421 U.S. 684, 44 L.Ed. 2d 508, extends to the instant case thus mandating that any requirement that defendant prove mitigating factors to avoid the death sentence be deemed a violation of due process. Mullaney v. Wilbur, supra, does not extend to the instant case because Mullaney only precludes on due process grounds, a requirement that a defendant prove any element of a crime. Here, defendant challenges a requirement that defendant prove mitigating circumstances with respect to sentencing. Because the punishment aspect of a case, i.e., sentencing, is clearly distinguishable from

7/ At trial, counsel for defendant failed to object to the charge and state specific grounds for the objections required by Crim. R. 30. However, these assignments of error are addressed under Crim. R. 52(B), which permits the court to notice errors affecting substantial rights.

the adjudicatory phase, we conclude that the Ohio statute challenged here does not violate the due process clause of the United States Constitution even though a defendant found guilty must prove the mitigating circumstances by a preponderance of the evidence.

The seventh assignment of error is not well taken.

Assignments of Error Nos. 8 and 9:

- "8) The statutes (R.C. of Ohio, §§2929.03 and 2929.04) under which this appellant was sentenced to death violates the eighth amendment to the United States Constitution.
- "9) Assuming the above statutes are at least valid 'on their face', then as utilized herein as a basis for imposing the death penalty, they violate rights guaranteed this appellant by the eighth amendment."

The Ohio Supreme Court has recently considered and rejected the argument that the Ohio Death Penalty statute is unconstitutional as violation of the Eighth Amendment, State of Ohio v. Bayless (1976), 48 Ohio St. 2d 73. Because the Ohio Supreme Court has passed on this question in State of Ohio v. Bayless, supra, we are bound to follow the Bayless rule.

The eighth and ninth assignments of error are not well taken.

Assignment of Error No. 10:

- "10) The court abused its discretion in failing to grant the defense a continuance to obtain evidence arguably relevant to the appropriateness of the sentence imposed."

The granting of continuances is within the discretion of the court. Here, approximately two months had elapsed from the end of trial until the sentencing hearing on the murder conviction (Supp. Tr. 28). During that period of time there is no record evidence that counsel for defendant made any effort to obtain the alleged medical records in advance of the hearing date for sentencing (see Supp. Tr. 20-23). Under these circumstances the court did not abuse its discretion in overruling defendant's request for a delay of the hearing date.

Assignment of Error No. 10 is not well taken.

Reversed and remanded for further proceedings according to law.

No other error appearing in the record, this cause is remanded to the Common Pleas
Court for further proceedings according to law.

It is, therefore, considered that said appellant(s) recover of said appellee(s) his ... costs herein.

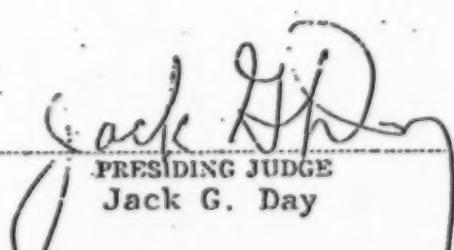
It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of
Appellate Procedure. Exceptions.

DAY, C. J.

JACKSON, J.

PATTON, J., CONCUR


PRESIDING JUDGE
Jack G. Day

For plaintiff-appellee: John T. Corrigan
For defendant-appellant: Peter Hull and James Willis

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

STATE OF OHIO)
) ss:
SUMMIT COUNTY)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
(January Term, 1976).

STATE OF OHIO,)
Plaintiff-Appellee)
v.)
SANDRA LOCKETT)
Defendant-Appellant)

C. A. No. 7780

APPEAL FROM JUDGMENT
ENTERED IN THE COURT
OF COMMON PLEAS OF
SUMMIT COUNTY, OHIO
CASE NO. 75 1 96

DECISION AND JOURNAL ENTRY

Dated: March 3, 1976

This cause was heard January 28, 1976, upon the record
in the trial court, including the transcript of proceedings,
and the briefs. It was argued by counsel for the parties
and submitted to the court. We have reviewed each
assignment of error and make the following disposition:

DOYLE, J.

This appeal is presented from a judgment of the Court
of Common Pleas of Summit County, in which court the
defendant-appellant, Sandra Lockett, was convicted of the
crimes of aggravated murder with two specifications and
aggravated robbery. Pursuant to the verdict of the jury,
the court, after conducting the statutory sentencing hearing

overruled.

Assignment of Error No. 7

"The instructions to the jury on the charge of involuntary manslaughter and the failure to instruct on the defense of accident represented plain error substantially affecting the rights of the defendant."

Ohio Crim. R. 30 covers this assignment of error.

However, it is observed that the court's charge on involuntary manslaughter would adequately include an accidental killing during a robbery. There is no error here.

Assignment of Error No. 8

"The trial court erred in imposing the death sentence on appellant, Sandra Lockett, for aiding and abetting an aggravated murder, while permitting the trigger-man, the principal, Al Parker, to be given the lesser sentence of life-imprisonment.

"A. For the prosecution to enter into a deal with the principal in the murder to give him a sentence of life imprisonment in exchange for his testimony against the aiders and abettors, was repugnant to concepts of fair play and justice and unconstitutional selective enforcement under the Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

"B. Sentencing appellant, Sandra Lockett, to a more severe sentence than principal, Al Parker, is a 'legal contradiction' which must be corrected."

Prior to the trial of this case, the defendant was

offered the same "negotiated plea" that was allowed to Parker, the State's chief witness. She refused the offer on several occasions and voluntarily consented to trial before a jury. In fact, her attorney explained in specific language what might be the consequences of a trial but after conference she continued to refuse the offer. She voluntarily assumed the risk of a death penalty.

That the triggerman in a murder should receive a life sentence and an accomplice or aider and abettor should receive a death sentence may appear unusual, but it must be observed that this accused was just as guilty of aggravated murder and aggravated robbery culminating in murder as was the man who pulled the trigger. In fact, this defendant was not only an actual participant in the robbery but she was one of the chief negotiators of the robbery of the particular store and was an active manager of the entire affair, including the method employed to secure the gun used in the murder.

We do not find here a violation of any constitutional rights of the defendant and the assignment of error is overruled.

Assignment of Error No. 9

"The jury verdict of guilty on the charge of aggravated robbery is not supported by

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felonious acts of the triggerman, Al Parker, including that of aggravated robbery.

This claim of error is not sustained and is overruled.

Assignment of Error No. 13

"The ineffectiveness of trial counsel denied defendant-appellant of her Sixth Amendment right to counsel."

It has been heretofore stated that the trial counsel appointed for the defendant-appellant were competent lawyers of high standing and that their trial strategy came well within the rules of good practice. Mere failure to make objections, which on hind sight may seem appropriate, is not sufficient in this case to establish reversible error.

This claim of error is not well taken and is overruled.

Assignment of Error No. 14

Sections 2903.01, 2929.03 and 2929.04 of the Ohio Penal Code permits arbitrary imposition of the punishment of death in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States."

Last year (1975) this court had before it on appeal the case of State of Ohio v. Bayless, Summit No. 7513, unreported. We then held, and now hold in the instant case, that Ohio's latest capital punishment statutes do not allow the arbitrary imposition of the death penalty nor does their enforcement constitute cruel and unusual punishment.

The State of Ohio permits capital punishment under the guidelines set out, and the enforcement of this statute does not contravene the provision of the Constitution. We affirm our conclusion in Bayless, *supra*, and overrule this assignment of error.

Assignment of Error No. 15

"The death penalty offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States."

This assignment of error is overruled. This court, in previous cases, has denied this claim. We believe this case was tried and judgment entered within constitutional and statutory boundaries, and the error now claimed is not sustained.

Assignment of Error No. 16

"The sentencing stage following a conviction for aggravated murder with specifications is unconstitutional in that it places the burden on the defendant to establish a reason why he should not be executed."

The record establishes a compliance with R.C. 2929.03. Following the jury's verdict and judgment thereon that the defendant had committed aggravated murder with two specifications and aggravated robbery, the trial court accorded the defendant the statutory hearing required in

R.C. 2929.03. The hearing is given for the purpose of hearing evidence in mitigation of the statutory death penalty. This statute states that if it be found "that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment."

Mitigation of sentence has traditionally been a defense function, and the right of leniency has always been based upon the circumstances of the case and of the circumstances surrounding the defendant himself. R.C. 2929.04(B) reads:

"(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [preponderance] of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense

of insanity."

We find no conflict with the Constitution or other laws in this statutory provision governing mitigation of sentence pursuant to a separate hearing after guilt has been established. In fact, it provides an added benefit to the convicted felon.

This assignment of error is without merit.

Assignment of Error No. 17

"The trial court should not have imposed the death penalty in this case, because the offense was primarily the product of a mental deficiency, and such fact precludes the death penalty, under O.R.C. §2929.04(B)(3)."

The testimony of men who were shown to be experts in their respective fields was of sufficient verity for the trial court to conclude that the defendant did not fall within the category of persons exempted by the statutes from capital punishment. All of the examiners concluded that the defendant was not suffering from a mental deficiency and that the defendant's participation in affairs of which she was charged was not a product of a psychosis or mental disorder amounting to a mental deficiency.

This assignment of error is not well taken and is overruled.

Assignment of Error No. 18

"The defendant was denied a fair trial and due process of law by reason of misconduct of the prosecutor during the course of the trial."

It has long been the law of this State that improper remarks of counsel for the State during argument, unless so flagrantly improper as to prevent a fair trial, should be at once objected to; otherwise, error cannot be predicated upon the remarks alleged to have been improper.

Here the record is devoid of objections in most instances. As a consequence, the defendant has waived her right, if any existed, to raise the issue of prejudicial error. Over and beyond this, however, there is no error claimed which, if true, prevented a fair trial.

We find no error of a prejudicial character in this claim and it is overruled.

This case presents a heinous murder of an innocent victim. We have examined with care each and every claim of error and find none prejudicial to the rights of the defendant denying her a fair trial. Her constitutional and statutory rights have been well guarded by the trial court and the final judgment here under review must be and hereby is affirmed.

The judgment is affirmed.

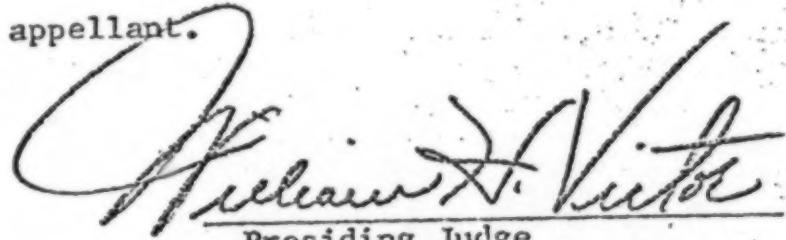
The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Court of Common Pleas to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be filed stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Costs taxed to appellant.

Exceptions.



Presiding Judge
- for the Court -

VICTOR, P.J. and
BRENNEMAN, J.
CONCUR.

(Doyle, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment under authority of Section 6.(C)Article IV, Constitution).

APR 14 11 15 AM '76

IN THE COMMON PLEAS COURT OF ASHLAND COUNTY, OHIO
ASHLAND COUNTY, OHIO

STATE OF CHIO.

Plaintiff. : Case No. 5302

vs. : JUDGMENT ENTRY

ROBERT EARL HINES,

Defendant. :

This cause came on for hearing this 13th day of April, 1976. The defendant, Robert Hines, was present in open court and represented by his attorneys, Jacob Fridline and William Nearhood. The State of Ohio was present and represented by the Prosecuting Attorney for Ashland County, Anthony R. Auten. This hearing is brought pursuant to Section 2929.04, Ohio Revised Code, titled "Criteria for Imposing Death or Imprisonment for a Capital Offense." At the beginning of said hearing, the Court did outline the procedure to be followed and inquired of the counsel for the defendant whether or not that procedure was acceptable and whether or not he had received all necessary reports. Counsel for the defendant indicated agreement with the procedure and acknowledged receipt of the copy of the psychiatrist's report, psychologist's report and pre-sentence investigation prepared by the Ashland County Probation Department. The State of Ohio acknowledged receipt of the psychiatrist's report and psychologist's report, but had not received the pre-sentence investigation report, and did accept the procedure as outlined by the Court.

Whereupon, the first witness, Dr. John Vermeulen, presented testimony in the form of a report, and the counsel for the defendant and for the State and the Court did have the full opportunity to examine the witness further.

At the conclusion thereof, testimony was received by the court appointed psychologist who had examined the defendant, Robert Hines, who also presented a written report and was further examined by counsel for the defendant, the prosecution, and the Court.

At the conclusion thereof, counsel for the defendant, Mr. Fridline,

presented argument on behalf of the defendant and the Court did permit the defendant to provide unsworn testimony on his own behalf.

At the conclusion thereof, the Prosecuting Attorney presented argument, and at that time, Court was adjourned for a decision to be made at the conclusion of the next hearing involving co-defendant, Mark Nyle Lucas. The defendant was remanded to the custody of the Ashland County Sheriff's Department.

At the conclusion of the testimony and evidence presented on behalf of Mark Nyle Lucas, pursuant to Section 2929.04, Ohio Revised Code, the defendant, Robert Hines was returned to the court room and was represented by his attorney. The state of Ohio was present represented by the Prosecuting Attorney.

The Court did make the following finding:

1. That the defendant had failed to establish by a preponderance of the evidence that the victim of the offense had induced or facilitated it;
2. That the defendant had failed to establish by a preponderance of the evidence that it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation; or,
3. That the defendant failed to establish by a preponderance of the evidence that the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Thereafter, the Court made a general finding that the defendant had failed to establish any of the three mitigating circumstances listed above pursuant to Section 2929.04, Ohio Revised Code.

The Court did inquire of the counsel for the defendant whether or not he wished to speak on behalf of the defendant prior to imposition of sentence. Counsel for the defendant indicated he would have an oral motion immediately after sentencing. The Court inquired of the defendant whether or not he wished to speak on his behalf or knew of any reason why sentence should not be pronounced at this time. The defendant indicated, no.

Wherefore, the Court did sentence Robert Earl Hines to death by electric current in the electric chair for the state of Ohio, and did set the date of November 15, 1976, for imposition of execution. The Court further ordered that after proper documents had been drawn, defendant was to be remanded to the custody of the Southern Correctional Facility at Lucasville, Ohio.

Immediately after pronouncing sentence, the Court did inform the defendant and counsel, in open court, pursuant to Rule 32, Ohio Criminal Rules Procedure, that 1) the defendant had a right to appeal, 2) if he was unable to pay the cost of an appeal, he has the right to appeal without payment, 3) if he is unable to obtain counsel for an appeal, counsel will be appointed without cost, 4) if he is unable to pay the costs of documents necessary to an appeal such documents will be provided without cost, and 5) he has a right to have a notice of appeal timely filed on his behalf. The Court further inquired of the defendant whether or not he wished to have the court appoint forthwith counsel for appeal. The defendant indicated that he wished counsel be appointed on his behalf and indicated to the court that he was satisfied and willing to be represented further on an appeal by attorney Jacob Fridline. The Court did thereafter appoint Jacob Fridline attorney to perfect an appeal in the above case and to protect the defendant's rights therein. Counsel Fridline orally accepted said appointment and did move the Court for a stay of execution in this matter pending appeal and pending decisions of the Ohio and U. S. Supreme Courts concerning the constitutionality of the death penalty. The Court did indicate that upon a written motion being filed, the Court would consider and act upon same. Defendant is remanded to the custody of the Ashland County Sheriff's Department.

Paul H. Kridenay
Judge

Approved:

Anthony R. Carter
Prosecuting Attorney

Jacob M. Fridline
Attorney for Defendant

or mental deficiency. There is no testimony before the court that would permit that interpretation, therefore they are not going to be able to reach the burden or preponderance as required.

The court, well realizes the intelligence of this defendant differs somewhat from the first one and that this particular defendant does not at all times act as a normal individual.

I have not written the laws and the penalty statute and certainly the court has not. I think the statute is clear that this must be primarily the result of one of these two things. I will not belabor the point. On behalf of The State we would submit, aside from the fact of Mr. Kennedy's arguments,,, that this burden has not been met.

Thank you.

THE COURT: Is there anything further, Mr. Kennedy?

MR. KENNEDY: I do not wish any rebuttal.

THE COURT: At this time I think I will have Mark taken down to the Library Annex and have Mr. Hines brought over. (recess).

4:55 p.m. THE COURT: Please be seated Mr. Fridline and Mr. Hines.

It has been a long day here and hs has been mentioned

here, it is a day of real seriousness and the arguments of 2111
counsel have been very eloquent and very appropriate and
directed to the issues.

I believe that counsel realizes since the United States Supreme Court's Opinion that the Ohio Legislature in attempting to implement that decision has mandatorily required the death penalty in such a case as this, unless the mitigating circumstances are involved.

On February the 17th a Jury and I would say with nine women on it, had a tremendous responsibility in determining in the first instance whether there should be a conviction and the seriousness of that conviction. Every effort was made in that case to attempt to give a fair trial and even in the Charge by the court there was reference to the mental ability of the parties, but we are down now, not to what the court thinks. The court hasn't anything to do with it insofar as mercy of justice is concerned and whether the court likes it, whether any of you like it we are governed by the law and once we are governed by the man then the law becomes meaningless and so my approach to this today has been to wait and listen to all the arguments and all of the evidence and to the best of my ability to determine whether the burden of proof has been established by a preponderance of the evidence the mitigating circumstances.

I want the defendants and counsel to understand that in

R. J. H.

this court's opinion society does not need to apologize for 211
its effort in enacting a law such as this. It has deep con-
cerns relative to the elimination to this type of a crime
and this act was meant to effectuate that and in doing so it
took away discretion of the court, and perhaps properly so.

But in any event, this court has considered and considered
many times the nature and circumstances of the offense, the
history, character and condition of the offender and the three
mitigating circumstances and the court can not find that the
defense has established at all by a preponderance of the
evidence - "(1) The victim of the offense induced or facilitated
it." The court can not find that at all. (2) It is unlikely
that the offense would have been committed, but for the fact
that the offender was under duress, coercion, or strong
provocation." I see no applicability to that. And (3) "The
offense was primarily the product of the offender's psychosis
or mental deficiency, though such condition is insufficient
to establish the defense of insanity." So, I must announce
that the defendant has failed to establish by a preponderance
of the evidence any mitigating so as to preclude the penalty
as provided by law.

Therefore, the court at this time the court will proceed
to the sentencing. If you will kindly stand, Mr. Fridline
and Mr. Hines.

Is there anything that counsel - either counsel care to

say prior to the imposition of sentence?

2113

MR. FRIDLIN: We have a motion after the sentence.

THE COURT: Yes. Before sentence is pronounced Mr. Hines or Robert, do you have anything to say why judgment should not be pronounced or anything in mitigation of the sentence?

MR. HINES: No, sir.

THE COURT: Robert Hines, I sentence you to death by electric current, by electric chair at Southern Correction Institution, Lucasville, Ohio on the 15th day of November, 1976 in the manner provided for in the Revised Code 2949.22.

I wish to advise you today that you have a right to appeal. If you are unable to pay the costs of an appeal, you have the right to appeal without payment. If you are unable to obtain counsel for an appeal, counsel will be appointed without cost. If you are unable to pay the costs of documents necessary for appeal, such documents will be provided without cost. You have a right to have a notice of appeal timely filed on your behalf and upon your request the court shall forthwith appoint counsel for your appeal.

Do you desire counsel at this time?

MR. HINES: Yes.

THE COURT: You do?

MR. HINES; Yes, sir

THE COURT: Do you desire to continue with Mr. Fridline?

MR. HINES: Yes.

2114

THE COURT: At this time let the record show, that the court is appointing Mr. Fridline for the appeal.

At this time you will be remanded back to the sheriff of the county until such time as a writ can be prepared to transport you to Lucasville. In the meantime if the sheriff will take the defendant and his family to the Library Annex, along with his counsel, so he may have some time with them.

MR. FRIDLIN: Your honor, first I accept the appointment of the court and at this time I move for an automatic stay of execution in that the issue of the death penalty is currently under advisement of the Supreme Court of the United States and that all proceedings pursuant to this should be stayed pending the decision of the United States Supreme Court.

THE COURT: Alright you file a written motion and we will consider that.

THE COURT: Let the record show this is in the matter of Mark Lucas. Let the record show the court has considered the matter and the court wishes you to know, Mark that this section of the law which provides for these proceedings is the result of societies' attempt to find the solution to reduce crime such as this.

IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

STATE OF OHIO,)
Plaintiff,)
vs.)
WILLIAM PERRYMAN,)
Defendant.)
CASE NO. 75-3-436
PARTIAL TRANSCRIPT OF
PROCEEDINGS
Volume V

APPEARANCES:

On behalf of the State of Ohio:

Mr. Charles Kirkwood

On behalf of the Defendant:

Mr. William Calhoun, and
Mr. Park Thompson

BE IT REMEMBERED that this cause came on for hearing before the Honorable Evan J. Reed, Court of Common Pleas, Summit County, Ohio, on the 7th day of August, 1975, and the following proceedings were had, being a partial TRANSCRIPT OF PROCEEDINGS.

Carl E. Clayton, Jr., Official Reporter
Room 300, Summit County Courthouse
Akron, Ohio 44303

OFFICIAL SHORTHAND REPORTERS, AKRON, OHIO

sentence of the law and the judgment of the Court on this count that you be taken hence to the Summit County Jail and there safely kept, and that within five days you be conveyed by the Sheriff of Summit County to the Ohio State Penitentiary, there to be imprisoned for a time of not less than seven nor more than 25 years, or until you are otherwise legally discharged.

That takes care of the aggravated robbery.

Secondly, on the charge of aggravated murder. Is there anything you have to say as to why judgment should not be pronounced with regard to the aggravated murder case?

MR. PERRYMAN: No, sir.

THE COURT: Thank you. The Court finds from the review of all reports, testimony, statements and arguments of counsel that there is no mitigating circumstances in this case. It is therefore the sentence of the law and the judgment of this Court that you be taken hence to the Summit County Jail, and there safely kept and within 30 days you be conveyed by the Sheriff of Summit County

OFFICIAL SHORTHAND REPORTERS, AARON, OHIO

TERMINATED CASE REPORT

1. COUNTY OF INDICTMENT

Trumbull

Do Not Write In Space Below
STATE OFFICE USE ONLY

3. CHECK ONE:

SEX

0-MALE
 1-FEMALE

4. CHECK ONE:

RACE

2-WHITE
 3-NEGRO
 4-YELLOW
 5-OTHER

5. AGE AT FILING OR ARRAIGNMENT

7. DATE OF FILING OR ARRAIGNMENT

MONTH YEAR

10. DATE CASE TERMINATED

MONTH YEAR

15. DISPOSITION (CHECK ONE ONLY)

0-PLEAD GUILTY
 1-TRIAL BY JURY-GUILTY
 2-TRIAL BY COURT-GUILTY
 3-TRIAL BY JURY-NOT GUILTY
 4-TRIAL BY COURT-NOT GUILTY
 5-TRANSCRIPT DISMISSED

6-INDICTMENT DISMISSED
OR NOLLE PROSSED
 7-NO BILL
 8-TO MENTAL INSTITUTION
 9-OTHER

50 51 52 53 54 55 56 57 58 59

16. SENTENCE (CHECK ONE ONLY)

0-NONE
 1-IMPRISONMENT
 2-FINE AND IMPRISONMENT
 3-FINE AND/OR COST
 4-FINE AND/OR COST SUSPENDED
 5-SUSPENDED OR DEFERRED SENTENCE
 6-PROBATION
 7-LEGAL ELECTROCUTION

50. DOCKET NUMBER

17. INSTITUTION CONFINED TO (CHECK ONE ONLY)

0-NONE
 1-CHILlicothe
 2-O. S. R.
 3-O. R. H.
 4-JAIL
 5-WORKHOUSE
 6-L. S. H.

61. DEFENDANT'S NAME

23. OFFENSE CHARGED * (USE CODE LIST
ON BACK OF FORM)

25. OFFENSE CONVICTED **
(IF UNABLE TO CODE, EXPLAIN IN APPROPRIATE SPACE
ON THE BOTTOM OF REVERSE SIDE)

LAST FIRST MIDDLE

NO. 76-38

IN THE SUPREME COURT OF OHIO

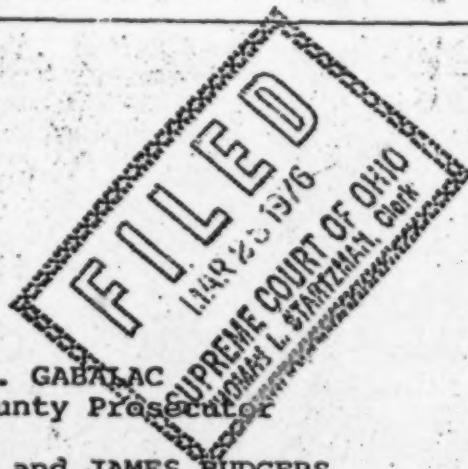
Appeal from the Court of Appeals
Ninth Judicial District
Summit County, Ohio
(C.A. No. 7784)
(C.P. No. 75 1 52)

STATE OF OHIO
Plaintiff-Appellee

vs

FLOYD EDWARDS
Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT



CHUPARKOFF, LOMBARDI & REED

By: TED CHUPARKOFF
501 E. Exchange Street
Akron, Ohio 44304

Counsel for Defendant-Appellant

STEPHAN M. GABALAC
Summit County Prosecutor

FRED ZUCH and JAMES RUDGERS
Assistant Summit County Prosecutors
City-County Safety Building
Akron, Ohio 44308

Counsel for Plaintiff-Appellee

of the prosecution's case and to anticipate beforehand the evidence which the State has to present to the jury. Calling witnesses unknown to the Defendant deprives the Defendant of his right of discovery which is prejudicial to his rights of a fair trial.

The Court of Appeals, in overruling Defendant's claim that to allow Officer Davis to testify was prejudicial, found said error to be non-prejudicial for the reasons that:

1. Mack Newberry, Davis' partner, suffered a heart attack the night before;
2. Officer Davis' testimony was not crucial;
3. Rule 16-E-3 permits the Court in its discretion to allow such testimony.

The Defendant obviously disagrees. First of all, the Court erred in concluding Newberry was a Police Officer and Davis' partner. (p. 293 and 341). Mr. Newberry was to be a lay witness. Secondly, if Davis' testimony was not crucial, why was he called? How did the State propose to introduce State's Exhibits 4 through 10 into evidence, and finally Criminal Rule 16-E-3 pertains to physical evidence, not witnesses.

The Court admits that the prosecution erred, but concludes that it is non-prejudicial. It is the Defendant's position, as noted in proposition #1, any error deprives the Defendant of a fair trial, and this is especially true when so-called non-prejudicial errors are compounded.

SUMMIT COUNTY COURT OF COMMON PLEAS
ADULT PROBATION DEPARTMENT

207 South Broadway

Akron, Ohio 44308

PRESENTENCE INVESTIGATION

DATE April 4, 1975

JUDGE Honorable James V. Barbuto PROSECUTING ATTORNEY F. L. Zuch and
James Rudgers

DEFENDANT Floyd nmn Edwards CASE NUMBER # 75 1 52

ADDRESS Summit County Jail JAIL Yes BAIL No

AGE 21 DATE OF BIRTH 12-4-53 ATTORNEY Ted Chuparkoff, Charles D. Park

SEX Male RACE Negro PHONE

MARITAL STATUS Single DATE REFERRED March 10, 1975

OFFENSE Aggravated Murder (1) R. C. 2903.01

Aggravated Robbery (1) 2911.01

This writer did not personally witness any portion of the trial. The following synopsis of the Official-Version of the offense is based upon a review of Police and Prosecutors Reports and notes, various statements and personal interviews.

On December 28, 1974, Akron Police were summoned to 225 Wooster Avenue, Comet Tool Company, in reference to a possible homicide. This was sort of a junk store and space was very limited in it such that there was an isle down the middle of all the junk that is only two to three feet wide. The victim was in the isle approximately twenty (20) feet from the door. He was found kneeling with the left side of his forehead resting on the floor, and his body was slightly slumped to the left and had both arms underneath him. There was a 7.65 caliber shell casing found by the police officers lying on a piece of paper on a chair. The chair was approximately two (2) feet from the victim. The victim had suffered a single gun shot wound in the back of the head approximately two (2) inches above the hairline.

The first to find the victim, Mack Newberry, N/M 77 years of age, 189 Wooster Avenue told the police that he had known the victim for approximately seventeen (17) years and that Mr. Eshack was suppose to come to his apartment that evening to fix a sink, but did not show up. Newberry states that about 5:45 he left his apartment to walk to the store on Nabash Avenue, and in doing so, had to walk past Comet Tool. The front door of the business was closed. When Newberry came back from the store, he noticed the front door of the Comet Tool Company was open, so he went in, he saw the victim on the floor, so he approached him and when he got no response he called the police. The police then talked to several neighbors and businessmen in that area, but could offer no further information except that one (1) Perry Cole W/M 54, of 207 Wooster Avenue said that the "victim had some trouble with two (2) colored guys," but he didn't no any more than that.

The victim was transported to Akron General Medical Center and pronounced DOA by Doctor Roush at 7:17 p.m. When the victim's family arrived at the hospital, Mrs. Eshack stated that her husband might have had a considerable amount of money on him, because all his business was done in cash.

On December 29, 1974, Joseph Eshack's wallet was turned into the Akron Police by Daniel Owmens N/M 55 of 50 Cotter Street. He is a maintance man in the Edgewood Homes Projects. He told the police that the wallet had been found by Gary Hendon who was sweeping some steps leading down and into the basement unit of 687 Warner Court. He stated that there was no money, but there is some cards and papers that he turned over to the police. Identification revealed that the wallet belonged to Mr. Eshack.

On January 10, 1975, Detective G. Goodwill, Sr. of the Akron Police Force, was given information about a possible suspect to a possible homicide. He stated that an informant at South High School had contacted him about Floyd Edwards who went to the school and talked to this individual about holding up a man and that he did shoot someone.

The police then proceeded to 915 Lane Street, home of Haywood Manny, an address given that possibly Edwards was also staying at that address. Floyd Edwards and Haywood Manny and Anita Watson, N/F age 18 of 307 1/2 Ira Avenue, the girlfriend of Manny, were taken down to the Akron Police Department for questioning.

The following is a summary of each statement the subjects gave to the police:

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Appendix to Petition for a Writ of Certiorari and the Appendix thereto to counsel for the Respondent, Mr. Stephen M. Gabalac, Summit County Prosecutor, City-County Safety Building, Akron, Ohio 44308 on this 27th day of May 1977.

Richard S. Ayers

Attorney for Petitioner

PAGINATION AS IN ORIGINAL COPY

Supreme Court, U. S.
FILED

JUL 20 1977

MICHAEL KUDAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

May Term, 1977

No. ~~76-6837~~

FLOYD EDWARDS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

From the Supreme Court of Ohio

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OPPOSITION OF JURISDICTION

Petitioner has failed to raise an issue of
constitutional dimensions, requiring review pursuant to
28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Defendant was indicted for Aggravated Murder and Aggravated Robbery. Prior to trial, a hearing on a motion to suppress was held concerning the statements given by Floyd Edwards. That motion and other pre-trial motions were overruled. Upon the evidence presented, the jury found Edwards guilty of Aggravated Murder with a specification, and Aggravated Robbery. A mitigation hearing was had on April 29, 1975. The court determined that Edwards was not mentally deficient, and sentenced him to death in the electric chair. He was also concurrently sentenced to 7-25 years imprisonment for the conviction of Aggravated Robbery.

STATEMENT OF FACTS

Floyd Edwards was walking down Wooster Avenue, December 28, 1974, and met Stanford Harris. Edwards told Harris that he was going to rob Joseph Eschack. Edwards showed Harris a gun, and asked him if he wanted to come along. Harris answered yes. Joseph Eschack owned a tool rental and sale store, Comet Tools, located at 223 Wooster Avenue. Edwards on prior occasions had sold tire jacks to Eschack. Edwards and Harris entered the store and haggled over the price of various tools scattered about the floor of the store. The last item Edwards inquired about was a pair of wire cutters. As Eschack bent over to pick up the wire cutters, Edwards pulled the gun, and told Eschack to give him his money. Edwards grabbed Eschack's arm, and Eschack dropped the wire cutters. The two struggled and Edwards shot Eschack once in the head. That shot resulted in the death of Joseph Eschack. Eschack's wallet, containing \$65.00, and some identification papers were taken and divided by Edwards and Harris. Petitioner also stated that he showed a friend, Haward Manning, a newspaper article about the event, and talked about what happened at Eschack's place, and told Manning it did not bother him.

Gary Hendon, a custodian at the Edgewood Apartment Project found Eschack's wallet in the basement of one of the apartments. Gary went to school with Edwards and remembered seeing Edwards in the basement two or three days before finding

the wallet. Hendon gave the wallet to his boss, Dan Goins, who turned it in to the police. On January 9, 1975, Edwards was picked up by a car being driven by Haward Manning at approximately 5:30 p.m. Akron Police officers, on a stakeout, stopped the car and arrested both men.

Edwards was interrogated initially by Detectives Cross, Goodwell, and Craig. Edwards gave an oral, unrecorded statement, at approximately 6:30 p.m.

At 8:20 p.m., Edwards gave a recorded statement in the presence of Assistant Prosecuting Attorney John Shoemaker, and the above named detectives. When Prosecutor Shoemaker flipped the cassette to side two, it did not properly engage. Approximately 75 feet of the tape was blank. At 10:25 p.m., another recorded statement was taken to fill in the blank 75 feet.

Sometime during the interrogation of Edwards, and Manning, the location of the gun was ascertained. A search warrant was drawn and a search of 1125 Inman Street was made. During that search, a .32 Caliber automatic pistol was found. Edwards admitted that the gun was the one he used to shoot Eschack (Transcript, Page 401). This statement was also recorded at 2:45 a.m., January 10, 1975. The gun was eventually physically linked to the crime through a test firing.

PETITIONER'S FIRST REASON FOR
GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PART B

THE OHIO STATUTES VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS BY PLACING THE BURDEN OF PROOF UPON HIM WITH RESPECT TO THE ISSUE OF DEGREE OF CULPABILITY AND RESULTING PUNISHMENT.

Mullaney v. Wilbur, 421 U.S. 684 (1975) held that the Due Process Clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The Court held that the Maine statute requiring the defendant to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter, violated this requirement, and that in fact the State was required to prove the absence of this fact.

Respondent strongly contends that the rule of law enunciated in Mullaney does not apply to sentencing. One can readily distinguish proof of an element of a crime, from evidence presented at sentencing. The former is a presentation of the facts necessary to support each element of the crime. The Respondent accepts the burden of proving each element of the crime of aggravated murder beyond a reasonable doubt. It did so in this case.

However, sentencing and the procedures therein are a different matter. As in Florida, the Ohio statute requires the trial judge to consider sentencing. In determining that the death sentence should be imposed, the trial judge need only find that the mitigating factors are insufficient to outweigh the aggravating factors. Fla. Stat. Ann., section 921.141(3) (Supp. 1976-1977). Even when the jury recommends life, the trial judge may impose the death penalty where the facts supporting the death penalty are so clear and convincing that "Virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (1975).

The Respondent submits that there is no support for Petitioner's contention that the State must maintain the burden of proof beyond a reasonable doubt. To the contrary, this Court sustained Florida's capital sentencing structure, which requires the trial judge to find that the mitigating factors outweigh the aggravating factors. Proffitt v. Florida, 428 U.S. 242 (1976).

PART C

THE OHIO DEATH PENALTY STATUTES VIOLATE PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL BY A JURY OF HIS PEERS.

This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. Proffitt v. Florida, supra.

It is a somewhat anomalous argument to say that juries will sentence more even handedly than judges in capital cases. Juries do not ordinarily take part in the sentencing procedures in our system of criminal justice. They have a one shot opportunity to exercise this function. To say that they will be less arbitrary, and capricious than a trial judge who is experienced in the area of sentencing as it applies to the entire milieu of criminals, defies logic. A jury does not have the ability to compare the offender before it, with the other defendants similarly situated.

Petitioner facilely remarks that jury nullification is minimized by taking unbridled jury discretion away from juries in the face of mandatory death penalties, but implies that Ohio has a problem with jury nullification. That

argument is specious for two reasons. First, Ohio does not have a mandatory death penalty. Second, the jury does not make the sentencing decision.

Petitioner asserts that the jury should have the opportunity to weigh the aggravating and mitigating factors. It should be emphasized again, that the jury does determine the presence or absence of aggravating specifications. The jury considers the more factual aspects of the death penalty decision in considering whether a specification exists, or not. For example, in the instant case the jury found the Petitioner guilty of murder during the commission of Aggravated Robbery. Ohio Revised Code Section 2929.04(A)(7) (Specification).

Before the mitigation hearing the trial court is required to have a pre-sentence investigation and a psychiatric examination made. Ohio Revised Code Section 2929.03(D). These reports provide a wealth of information concerning "the character, conduct and record of the individual offender." Thus, the judge considers the usual sentencing criteria, in the mitigation hearing. The defendant has the advantage of a jury making statutorily guided decisions, and a judge evaluating him on an individual basis before the imposition of the death penalty.

If this Court determined that Florida's capital punishment statute withstood constitutional muster, Proffitt v. Florida, sapra, then Ohio's statute should likewise meet the

both the aggravating, and mitigating factors. In Ohio, the jury has already determined that an aggravating factor existed beyond a reasonable doubt. Accordingly, one must conclude that Ohio has gone further than the Supreme Court has required, in allowing the jury to take part in a portion of the death penalty decision making process. Since there is no constitutional requirement that a jury must take part in the sentencing process, Petitioner's argument herein is without merit.

PART D

THE STATE HAS ESTABLISHED NO COMPELLING STATE INTEREST WHICH WOULD JUSTIFY DEPRIVING PETITIONER OF HIS FUNDAMENTAL RIGHT TO LIFE.

Petitioner incorrectly utilizes a due process of law analysis to establish that the State has no justification for imposing the death penalty. Justice Reardon clarifies the role played by the due process clause of the Fourteenth Amendment in a constitutional attack on the State's right to impose the death penalty in the dissenting opinion of Commonwealth v. O'Neal, 327 N.E.2d 662, 700 (Mass. 1975):

"The Eighth Amendment is the appropriate avenue for consideration of this question but standing by itself is not applicable to the States. Rather it is because the due process clause has been held to incorporate the proscriptions against cruel and unusual punishments contained in the Eighth Amendment that we refer to the latter amendment as binding on the States.

...Putting to one side the question of arbitrary inflictions of punishments, all indications are that the only substantive limitation on punishments contained in the Federal Constitution is the Eighth Amendment proscription against cruel and unusual punishment."

It has been argued that the death penalty is unnecessarily cruel, however, this is to deny retribution, deterrence and incapacitation as justifiable social purposes in the punishment of murderers. Evidence that the death penalty has a greater deterrent effect than life imprisonment has been inconclusive, however, this Court held in

Gregg v. Georgia, 428 U.S. 153, 175 (1975), that:

"We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."

It is at least true that the death penalty is not grossly disproportionate to the crime of murder committed in the course of a robbery. Nor is there any purpose to inflict unnecessary pain. As was noted by four judges in Trop v. Dulles, 356 U.S. 86, 99 (1957):

"The death penalty has been employed throughout history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Petitioner's compelling state interest argument improperly raises a question under the Equal Protection Clause of the Fourteenth Amendment in depriving the Petitioner of "life, liberty or property". The Equal Protection Clause "applies only where there is an arbitrary discrimination between classes similarly situated". Roush v. White, 389 F. Supp. 396, 402 (N.D. Ohio 1975). The Petitioner has failed to establish a suspect classification.

The State submits that Ohio Revised Code Section 2929.04 (1974) does not create an arbitrary classification.

It applies to all who are found guilty by a jury of aggravated murder, the principal charge, and of one or more of the specifications of aggravating circumstances, absent one of

the three explicitly stated mitigating circumstances.

Respondent submits that the proper test to be applied is the "rational basis" test set out in McDonald v. Board of Elections, 394 U.S. 802, 809 (1969) which states that the statutory classification is valid if it is rationally related to a legitimate state interest. The Classification is afforded a presumption of constitutionality and will not be set aside if any set of facts reasonably can be conceived to justify it. The State submits that the death penalty is rationally related to legitimate state interests: deterrence of the crime of murder, retribution and incapacitation.

PART E

THIS COURT GRANT CERTIORARI TO CONSIDER WHETHER THE MITIGATION FACTORS LISTED IN OHIO CAPITAL PUNISHMENT STATUTE ARE UNCONSTITUTIONALLY LIMITED.

The only capital offense in Ohio under its new criminal code is Aggravated Murder. The death penalty is precluded unless a person is convicted of Aggravated Murder, and an additional aggravating specification, by the trier of the facts. Ohio Revised Code, Sections 2903.01, 2929.03, and 2929.04(A).

The death penalty is only considered at the sentencing stage if a person is convicted of both the principal charge and the specification. If a person is convicted in such a manner, a separate hearing is conducted to consider mitigating factors, as set out in Ohio Revised Code, Section 2929.04(B).

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The Supreme Court of Ohio automatically reviews all cases in which the death penalty has been imposed. Ohio Constitution, Article IV, Section 2.

Petitioner contends that Ohio's capital punishment statute has the same deficiencies as were found to exist in North Carolina and Louisiana. Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), Cf. Roberts v. Louisiana, 45 L.W. 4584 June 7, 1977. Those state capital punishment statutes were struck down because they had mandatory death sentences for certain classes of offenders, regardless of the circumstances of the offender.

However, an analysis of Ohio's capital punishment statute shows that it is similar to that of Florida. Fla. Stat. Ann., section 491.141. Proffitt v. Florida, supra. The sentencing procedure is at a bifurcated hearing, which only occurs after the trier of facts has found that the offender has committed aggravated murder with a particular specification, beyond a reasonable doubt. At the mitigation hearing any relevant evidence may be produced. The Ohio Supreme Court has held that:

Syllabus 2. Relevant factors such as the age of the defendant and prior criminal record are among those to be

considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R.C. 2929.04(B) (2) and (3) was established by a preponderance of the evidence. State v. Bell (1976), 48 Ohio St.2d 270.

While youth of the offender, and his lack of a prior criminal record are not specifically enumerated as separate mitigating factors they are considered by the Ohio Courts. Jurek v. Texas, 428 U.S. 262 (1976), upheld Texas' capital punishment statute even though none of the particularized mitigating factors were enumerated. The constitutionality of the Texas procedures was sustained because they allowed consideration of mitigating factors. Jurek v. Texas, 262, 271-272.

Additionally the Ohio Supreme Court has stated:

1. For the purpose of the mitigation inquiry, the words "psychosis or mental deficiency," as contained in R.C. 2929.04(B)(3), authorize the trial judge or panel to use the broadest possible latitude in determining the defendant's mental state or capacity.
2. Under R.C. 2929.04(B)(3), a convicted defendant's mental state or capacity should be considered in light of all the circumstances, including the nature of the crime itself, so that it may be determined whether the condition found to have existed was the primary producing cause of his offense. State v. Black (1976), 48 Ohio St.2d 262.

Since Ohio has three specific mitigating factors enumerated and considers other mitigating factors in the

same manner as Texas, Respondent submits that there are no constitutional infirmities in the mitigation portion of its capital punishment statute.

The Ohio Supreme Court has reviewed approximately twenty death sentences, and reversed only one (State v. Lockett (1976), 49 Ohio St.2d 71 which originated from Summit County). However, of the total number of cases (28) from Summit County in which a defendant was charged with a capital offense, only thirteen reached the mitigation stage, five of those defendants including the Petitioner now face the death penalty. Thus, it can be seen that a court can and does apply the mitigating factors where they are applicable.

Petitioner fails to show how the factors he complains of with respect to mitigation even apply to him. The State submits the nature of the crime, and all the other circumstances surrounding the Petitioner weigh heavily against, not for mitigation.

In summary, Ohio's capital punishment statute is not mandatory, and allows the broadest possible consideration of the defendant's mental state, age, and his circumstances including the nature of the crime in determining the applicability of the death sentence.

PART F

THE OHIO COURTS HAVE FAILED TO PROPERLY REVIEW OHIO'S DEATH PENALTY CASES.

Petitioner contends that Ohio Courts fail to properly review death penalty cases. The Ohio Supreme Court has stated:

"We have in this case, and will in all capital cases independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." State v. Bayless (1976), 48 Ohio St.2d 73, 86.

Petitioner then analyzes certain aspects of several other Ohio cases involving the death penalty. However, this case, when examined carefully, shows that great care was taken to present any evidence concerning mental deficiency, including the factors enumerated in State v. Black, supra. The Ohio Supreme Court reviewed the extensive record compiled at the mitigation hearing and found that the trial court was correct in finding no mitigating factor.

Petitioner showed that he was not extremely intelligent and did not perform well in school. If that alone were the criteria for avoiding the death penalty, a large percentage of the population of Ohio could murder another person, without fear of the death penalty.

PART G

OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSIBLY PENALIZE EXERCISE OF THE RIGHT TO TRIAL BY JURY.

Petitioner misapplies United States v. Jackson, 390 U.S. 570 (1968). That case held that a federal statute had an impermissibly chilling effect upon the right to trial by jury because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

This is not the case in Ohio. Under the Ohio statute, the death penalty is applicable whether trial is by jury or a three judge panel. The death penalty may be avoided under either choice.

The chilling effect on the right to trial by jury found in United States v. Jackson, supra, is simply not present in this case. Petitioner's conclusion that there is a more lenient sentencing standard for a three judge panel is unsupported. Whether there are three judges or one judge, they are presumed to follow the law.

PART H

THE OHIO STATUTORY SCHEME FOR CAPITAL PUNISHMENT CONTAINS A SUBSTANTIAL RISK THAT CAPITAL PUNISHMENT WILL BE INFILCTED IN AN ARBITRARY AND CAPRICIOUS MANNER.

Petitioner argues that since Ohio does not impose the death penalty in murder cases involving premeditated murder it allows the arbitrary infliction of the death penalty. This is directly contrary to the dictates of Gregg v. Georgia, supra for two reasons. First, excluding certain types of murder by narrowing the classification, is within the spirit of limiting the imposition of capital punishment, and providing guidance to juries as in Gregg. Second, counsel for Petitioner has supplanted its judgment for that of the legislature in determining what categories of murder should be punishable by death. Whether premeditated murder is more heinous than felony murder is clearly a legislative decision.

Petitioner also argues that there is no particularized consideration of the individual because it mandates that aiders and abettors get the death penalty. Simply put such is not the case. While an aider and abettor may be subject to the death penalty, there is no requirement that such a person receive the death penalty. Additionally, Petitioner has totally ignored the mitigating factors found in the Code in the first part of this section, and then concludes that since mitigating circumstances have been

found in other cases the death penalty is imposed arbitrarily.

The State maintains that, to the contrary, the fact that mitigating circumstances were found in an appropriate case denotes that the death penalty is not automatically applied to all persons convicted of aggravated murder with a specification.

PETITIONER'S SECOND REASON FOR
GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ACTION OF THE STATE TRIAL COURT IN REQUIRING PETITIONER TO SUBMIT TO A PRE-TRIAL PSYCHIATRIC EVALUATION WITH RESPECT TO A MITIGATING FACTOR WHOSE EXISTENCE COULD PRECLUDE THE IMPOSITION OF THE DEATH PENALTY AND MAKING EACH REPORT AVAILABLE TO BOTH THE JUDGE AND THE PROSECUTOR VIOLATES PETITIONER'S RIGHTS UNDER THE FIRST, FOURTH, SIXTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioner's contention that the trial court committed prejudicial error in ordering a pre-trial psychiatric evaluation of the Petitioner and then permitting the State to review same, is without merit for the following reasons.

First, Joseph Eschack was shot and killed on December 28, 1974. Gary Hendon testified that on December 30, 1974, he found the wallet of the deceased in the basement of 687 Warner Court and that Edwards slept there. On the same day, Hendon testified that he gave the wallet to his supervisor, Daniel Goins. Goins, in turn, testified that on December 30, 1974, he met with officers of the Akron Police Department at which time he gave the wallet to these officers. Thus, the officers assigned to the Eschack investigation were aware of both the wallet and Hendon and Goins as prospective witnesses long before the psychiatric evaluation was ever ordered.

Second, the Petitioner's recorded confessions were taken by officers of the Akron Police Department on the ninth

and tenth days of January, 1975. The psychiatric evaluation was not ordered until January 17, 1975, nor was a copy of same given to the prosecution until sometime in February, 1975. Thus, any details of the Petitioner's participation in the killing of Eschack contained in this report were not revealed to the State until after the investigation into this murder was drawing to a close. Therefore, the State submits that the psychiatric report of the Petitioner in no way provided any information concerning the Petitioner's participation in the killing that had not already been uncovered by the investigating officers.

Third, since this psychiatric report was never introduced into evidence nor referred to in the presence of the jury, any discussion of same concerning the guilt or innocence of the Petitioner is clearly academic. This Court has stated that where the record is insufficient to show that the trial judge infected the jury by his handling of a pre-sentence report no prejudicial error attaches to the fact that the report was submitted to the judge. Gregg v. United States, 394 U.S. 489 (1969).

Fourth, the Ohio Supreme Court affirmed the reliance on Section 2945.37 of the Ohio Revised Code, which requires an inquiry into the present sanity of the defendant, whether raised by the defendant or otherwise. (Copy of R.C. 2945.37 attached). The trial judge emphasized that his reason for ordering the report was to determine whether this person

should stand trial (Transcript, Pages 185-186).

Fifth, the report submitted by Doctor Migdal was not a pre-sentence report pursuant to Cr. R. 32.2(B). The references made by Petitioner to that provision, and the federal cases interpreting the similar Federal Rule are not applicable to this case. The report (appended to Petitioner's brief) is a brief recitation of the facts that Petitioner had already given in his taped recorded statement.

Finally, the Petitioner's contention that he was denied the opportunity to have his case tried before a judge instead of a jury is not well taken. The record is devoid of any request to have the case tried to the court. Furthermore, assuming arguendo that such a request was made, the trial court could have simply transferred the case to another court if it felt that the reading of the psychiatric evaluation of the Petitioner would preclude it from functioning as an impartial trier of fact.

Therefore, the State respectfully submits that the error committed by the trial court in ordering the psychiatric evaluation of the Petitioner before trial was clearly harmless.

PETITIONER'S THIRD REASON FOR
GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MERE RECITATION OF MIRANDA WARNINGS WITH A PURPORTED AFFIRMATIVE ANSWER AS TO THEIR MEANING COMPLIES WITH THE REQUIREMENT OF A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF THE RIGHT AGAINST SELF-INCRIMINATION, AND THE RIGHT TO ASSISTANCE OF COUNSEL BY PETITIONER WHO WAS A BORDERLINE RETARDED, HAD ONLY A SECOND-GRADE READING LEVEL AND WAS UNABLE TO READ THE MIRANDA WARNING CARD PRESENTED TO HIM.

The Petitioner was given all of the "Miranda" warnings prior to each interrogation (Transcript, Pages 192-193, 240-242, 358-361, 399-400 and 442-444). After each part of the warning was given, the Petitioner indicated that he understood that particular right. After all the warnings were given, the Petitioner was asked if, understanding his rights, he wished to talk about the homicide. Each time he immediately responded yes. Petitioner did not ask for an attorney. Edwards indicated that he was a high school graduate, and that he understood what was being said to him. Edwards was 21 years old. Under these circumstances the waiver was a knowing waiver. See United States v. Cook, 418 F.2d 321 (9th Cir. 1969).

This is not a case where the defendant asks for an attorney or indicates that he does not want to answer any questions. State v. Jones, 37 Ohio St.2d 21. Miranda v. Arizona, 384 U.S. 436 does not require a police officer to ask the defendant whether he wants an attorney; he need only

inform the accused, as was done here, that the accused has a right to a retained or appointed attorney. There is no evidence that the Petitioner did not understand what was being said to him at the time the warnings were read to him.

The State submits that the proper test in deciding whether the defendant's confession was involuntarily induced is the totality of circumstances test. The Court should consider the totality of the circumstances, including the age, mentality and prior criminal experience of the accused; the length, intensity and frequency of interrogation, the existence of physical deprivation or mistreatment; and the existence of threat or inducement. Brown v. United States, (C.A. 10, 1966), 356 F.2d 230, 232. The Supreme Court of Ohio, State v. Edwards, 49 Ohio St.2d 31, 39 (1976) held that under the "totality of circumstances" test, the Petitioner in this case had voluntarily waived his constitutional rights. The Petitioner, at the time of his first confession, had been in custody for only an hour. The atmosphere was non-coercive and the questioning had not been continuous. There was no physical deprivation or mistreatment. While Petitioner states that he was questioned for a period of eleven (11) hours, he was only in the interrogation room 9½ hours. Further, the interrogation was intermittent, and for short periods of time, not continuous.

There is evidence that the Petitioner was below average in intelligence. However, expert testimony indicated

that he was not mentally deficient or retarded. He was a graduate of one of the local high schools. There is evidence that he was educationally deficient. However, educational deficiency does not equate with mental deficiency. There is general agreement among the courts that a confession of crime is not inadmissible merely because the accused, who was not insane, was of less than normal intelligence. See, 69 A.L.R.2d 350; Bishop v. Rundle, 309 F. Supp. 312 (1970); Lunnermon v. Peyton, 310 F. Supp. 323 (1970). The record indicates that although the Petitioner may be of less than normal intelligence, that he understood what was being said to him.

PETITIONER'S FOURTH REASON FOR
GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT DENIED PETITIONER HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY ALLOWING PREJUDICIAL HEARSAY STATEMENTS AT PETITIONER'S TRIAL AND THEN PRECLUDING DEFENSE COUNSEL FROM COMMENTING TO THE JURY UPON THE FAILURE OF THE HEARSAY DECLARANT TO TESTIFY AT TRIAL.

Ohio Rule of Criminal Procedure 16(B) (4) provides:

The fact that a witness' name is on a witness list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at trial.

Respondent maintains that the prohibition is an absolute, without exception. The rule states that there "shall not be" comment on the fact that a witness was not called, although on a prospective witness list.

A party is not required to use every prospective witness it may have. Once the prosecution has established its case, it may rest at the point it chooses. The rule effectively precludes the opponent's raising doubt or innuendo about an uncalled witness, and what he might say.

If the Petitioner considered these people to have an important bearing on his defense, he could have subpoenaed them himself. The record shows that Manning was interviewed by defense counsel in the discovery stages of trial.

Finally, the trial court's ruling prohibited Petitioner from commenting upon the State not calling a person

as a witness. It was not a prohibition from mentioning that person's name or the testimony concerning that person. While this issue was raised below the hearsay issue now raised by Petitioner, has not been raised before. Accordingly, Respondent contends that issue has been waived.

PETITIONER'S FIFTH REASON FOR
GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S INSTRUCTIONS THAT IF THE JURY FOUND CERTAIN FACTS TO BE TRUE THEN "A PRESUMPTION TO KILL MUST BE INFERRED" VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Petitioner did not object to the charge, or request a correction. Criminal Rule 30 prohibits a party from assigning error to any portion of the charge unless he objects thereto before the jury retires. Also see, State v. Lane, (1976), 49 Ohio St.2d 77.

Further, the charge, relating to this issue, when read in its entirety reveals that the trial court properly instructed the jury. The trial court said the following:

"It must be established in this case that at the time in question there was present in the mind of the defendant a specific intent to kill Joseph Eshack, Jr.

Now, purpose is the decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

The purpose with which a person does an act is known only to himself unless he expresses it to another or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means and method and the weapon used, and all other facts and circumstances in evidence.

If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill must be inferred from the use of said weapon. Both an inference of intent to kill and an inference of malice may be inferred from the facts and circumstances of an unlawful killing where a deadly weapon is used." (Transcript, Pages 554-555).

The Ohio Supreme Court held that the above instruction did not constitute prejudicial error. State v. Edwards, 49 Ohio St.2d 31, 45 (1976).

Traditionally, Ohio Courts have held that, "in determining purpose, you may look to all the surrounding circumstances, including what was said and done in relation thereto, bearing in mind the presumption of law, that everyone is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent". State v. Huffman, 131 O.S. 27, 31 (1936). See also, Jones v. State, 51 Ohio St.331, 38 N.E. 79 (1894); Farrer v. State, 2 Ohio St. 54 (1853). It is not always possible to prove a purpose by direct evidence since purpose and intent are subjective facts within the mind of man. Presumptions as applied to criminal law are therefore, necessarily a part of trial practice.

In more recent cases Ohio courts have held that intent to kill..."may be deduced from the surrounding circumstances, including the instrument used, its tendency

to destroy life if designed for that purpose, and the manner of inflicting a fatal wound." State v. Robinson, 161 O.S. 213, 218-219 (1954). See also, State v. Fugate, 36 Ohio App. 2d 131, 132 (1973); State v. Salter, 149 O.S. 264 (1948).

Accordingly, the instruction taken as a whole was proper with respect to the element of purpose.

The applicable statute in the instant case, Ohio Revised Code section 2903.01(B) (1974) is not equivalent with the statute for first degree murder in the old code which required that deliberate and premeditated malice be proved. All that is required under the new statute is that the death be purposely caused while committing or fleeing after committing one of the specified felonies, including aggravated robbery.

CONCLUSION

The Respondent respectfully requests this Court, pursuant to the argument offered, to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

STEPHAN M. GABALAC
Prosecuting Attorney

Carl M. Layman III

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CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do hereby certify, pursuant to Supreme Court Rule 33(3)(b), that one copy of the Respondent's Answer to Petitioner's Writ of Certiorari was mailed, first class postage paid, to: ALBERT S. RAKAS, Attorney at Law, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325 and THEODORE CHAPARKOFF, Attorney at Law, 501 East Exchange Street, Akron, Ohio 44307.

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APPENDIX

APPENDIX A

STATUTE

[PROCEEDINGS ON PLEA OF INSANITY]

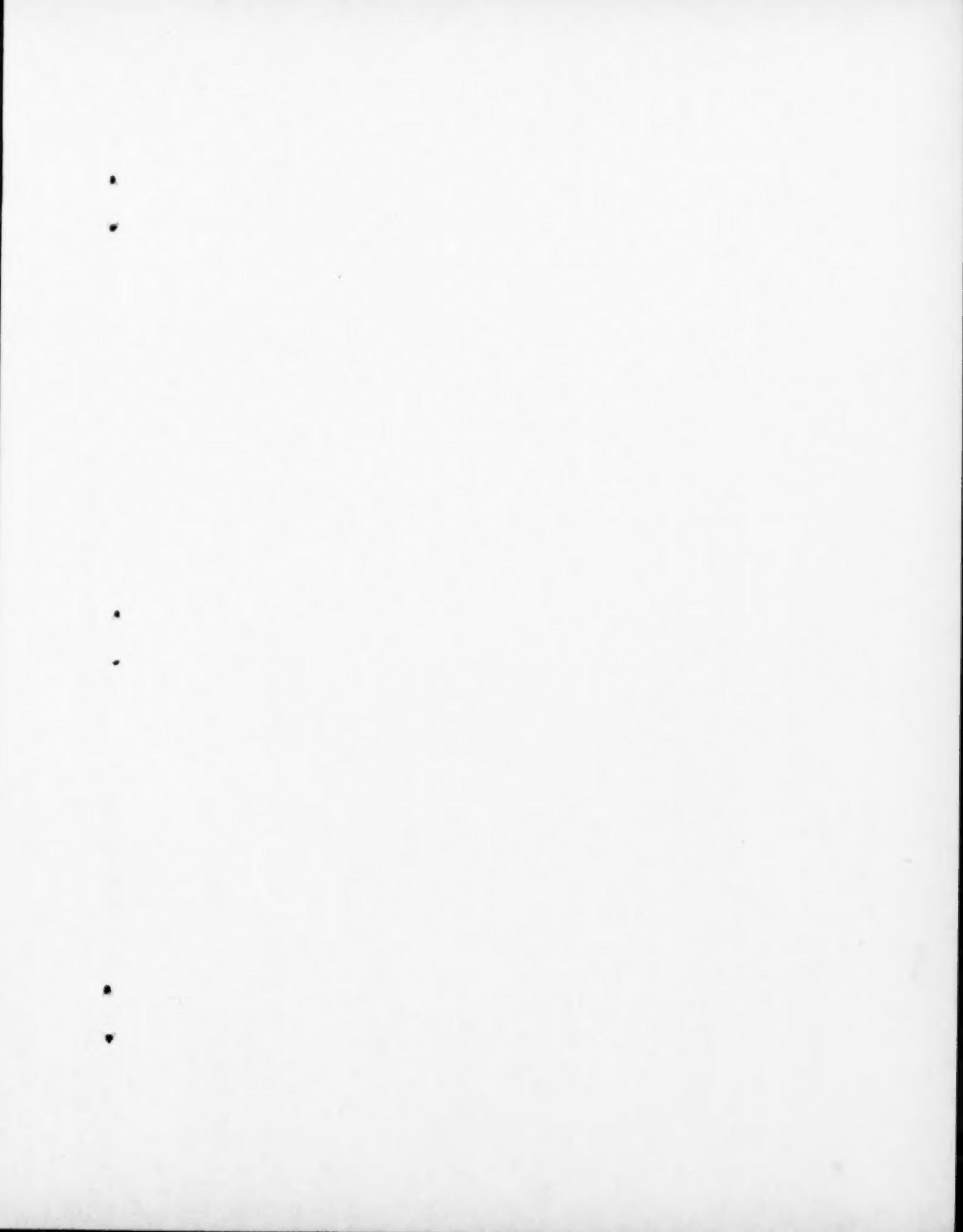
§ 2945.37 Inquiry into insanity of defendant. (CC § 13441-1)

If the attorney for a person accused of crime whose cause is pending in the court of common pleas, before or after trial suggests to the court that such person is not then sane, and a certificate of a reputable physician to that effect is presented to the court, or if the grand jury represents to the court that any such person is not then sane or if it otherwise comes to the notice of the court that such person is not then sane, the court shall proceed to examine into the question of the sanity or insanity of said person, or in its discretion may impanel a jury for such purpose. If three fourths of such jury agree upon a verdict, such verdict may be returned as the verdict of the jury. If there is a jury trial and three fourths of the jury do not agree, another jury may be impaneled to try such question.

HISTORY: CC § 13441-1; 113 v 123 (177), ch.20, § 1. E&P 10-1-53. Analogous to former CC §§ 13577, 13508, 13509.

Forms

Entry ordering sanity inquiry, 1 OCP&P 4.07b
Motion for Sanity Inquiry, 1 OCP&P 4.07



76-68837

SL 8 PAGE 27

Supreme Court, U. S.
FILED

AUG 8 1977

MCINTYRE, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

May Term, 1977
No. 76-6837

FLOYD EDWARDS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

ADDENDUM TO RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

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76-6837

PETITIONER'S FIRST REASON FOR
GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PART B

THE OHIO STATUTES VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS BY PLACING THE BURDEN OF PROOF UPON HIM WITH RESPECT TO THE ISSUE OF DEGREE OF CULPABILITY AND RESULTING PUNISHMENT..

In State v. Downs, 51 Ohio St.2d 47 (1977), (copy attached), the Ohio Supreme Court overruled paragraphs 11 and 12 of the syllabus of State v. Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), and the language which appears in State v. Woods, 48 Ohio St.2d 127 at 135, 357 N.E.2d 1059 at 1065 (1976), which reads: "(t)his is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation." The opinion stated at page 53 that the trial court did not in either case:

"(require the) defendant convicted of aggravated murder to prove certain mitigating circumstances by a preponderance of the evidence in order to be sentenced to life imprisonment rather than to death..."

The sections cited were held to be dicta.

The Ohio Supreme Court in the Downs case held that neither the defendant nor the prosecution is required by

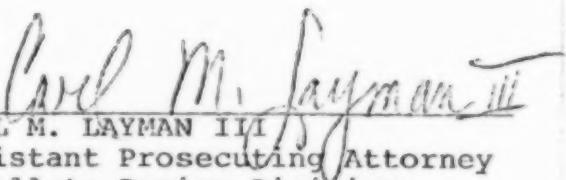
statute to offer testimony or other evidence of mitigating circumstances. Rather, the court has the initial responsibility to require that certain evidence be collected and certain examinations be made. From a careful consideration of those reports and evidence presented during the course of the trial, the judge, or panel of judges, decides whether mitigation is established by a preponderance of the evidence. This requires that the defendant bear the risk of nonpersuasion during the mitigation hearing, but does not impose an unconstitutional burden upon a defendant which would render the Ohio statutory framework for the imposition of capital punishment unconstitutional. Thus the defendant need not produce any evidence in the mitigation hearing, but if the evidence presented does not persuade the Court that a mitigating factor is present the defendant bears the risk of not presenting any evidence in support of mitigation.

Nor is the State constitutionally required to prove the lack of such mitigating factors beyond a reasonable doubt. The lack of mitigating factors is not an additional and constitutionally mandated element of a capital offense.

The State submits that any possible infirmity or misunderstanding with respect to the burden of proof in the mitigation hearing provided in R.C. 2929.04 has now been put to rest by State v. Downs, supra.

CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do hereby certify, pursuant to Supreme Court Rule 33(3)(b), that one copy of the Addendum to Respondent's Answer to Petition for a Writ of Certiorari was mailed, first class postage paid, to: ALBERT S. RAKAS, Attorney at Law, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325 and THEODORE CHUPARKOFF, Attorney at Law, 501 East Exchange Street, Akron, Ohio 44307.


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A P P E N D I X

Note: State v. Downs, 51 Ohio St.2d 47 (1977),
was of poor photographic quality and
not reproduced herein.